



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MAKUENI**

**ELC CASE NO. 449 OF 2017**

**CHRISTOPHER NDOLO MBUTA.....1<sup>ST</sup> PLAINTIFF**

**ANNA NDOLO MBUTA.....2<sup>ND</sup> PLAINTIFF**

**-VERSUS-**

**JACKSON MUTUA KAVILA.....1<sup>ST</sup> DEFENDANT**

**REUBEN MBUTA NDOLO.....2<sup>ND</sup> DEFENDANT**

**ESTHER WANZA MBUTA.**

**(Administrator of the Estate of ALICE NDUNGE).....3<sup>RD</sup> DEFENDANT**

**LAND ADJUDICATION AND SETTLEMENT**

**OFFICE MAKUENI COUNTY.....4<sup>TH</sup> DEFENDANT**

**THE COUNTY LAND REGISTRAR MAKUENI.....5<sup>TH</sup> DEFENDANT**

**RULING**

1. This Ruling is made in respect of two applications. The first is the Notice of motion dated 19<sup>th</sup> February, 2019 filed by the Plaintiffs while the second is dated 19<sup>th</sup> June, 2019 filed by the 1<sup>st</sup> Defendant. I shall dispense with the latter first. The application dated 19<sup>th</sup> June, 2019 was filed under certificate of urgency on 20<sup>th</sup> June, 2019. It is brought under Order 42 Rules 6 (1) and (4) of the Civil Procedure Rules, 2010 Sections 1A, 1B and 3A of the Civil Procedure Act and all other enabling provisions of the Law.

2. The Applicant seeks the following Orders: -

**i) Spent.**

**ii) THAT the proceedings herein be stayed pending the hearing and determination of Nairobi Court of Appeal Civil Appeal No. 160 of 2019 (Jackson Mutua Kavila -vs- Christopher Ndolo Mbuta & Annah Ndolo Mbuta).**

**iii) THAT this Court's Orders dated 29<sup>th</sup> September, 2017 be stayed.**

**iv) THAT costs of this application be provided for.**

3. The application is supported by the affidavit of Jackson Mutua Kavila, the 1<sup>st</sup> Defendant herein sworn on the same day and a further affidavit sworn on 14<sup>th</sup> October, 2020. The basis of the application is that the 1<sup>st</sup> Defendant/Applicant is dissatisfied with the Ruling delivered on 6<sup>th</sup> December, 2018 which dismissed the application dated 22<sup>nd</sup> November, 2017 that had sought to discharge an injunctive order. That the 1<sup>st</sup> Defendant has filed Civil Appeal No. 160 of 2019 against the said Ruling before the Court of Appeal and the same is pending hearing and determination. The 1<sup>st</sup> Defendant is also unhappy with the fact that the Plaintiffs have filed the application dated 19<sup>th</sup> February, 2019 seeking the enforcement of this Court's order of 29<sup>th</sup> September, 2017 with the aid of the police. Lastly, the 1<sup>st</sup> Defendant

claims that unless the orders sought are granted, he stands to suffer irreparably having occupied and developed the suit properties (Parcel Nos. 912,1160,1902 and 2916 – Mang’elele Settlement Scheme) for the last 25 years.

4. The application is opposed by Christopher Ndolo Mbuta, the 1<sup>st</sup> Plaintiff, vide the Replying affidavit sworn on 19<sup>th</sup> November, 2019 on his behalf and that of his Co-Plaintiff. The affiant deposed that the 1<sup>st</sup> Defendant forcefully entered the suit properties after his application dated 22<sup>nd</sup> November, 2017 was dismissed contrary to his averment of having occupied the suit properties for 25 years. That upon entry thereof, the 1<sup>st</sup> Defendant hired goons to prevent the Plaintiffs from accessing the suit property. That the said forced entry by the 1<sup>st</sup> Defendant is in violation of the order dated 29<sup>th</sup> September, 2019. That should the stay orders sought be granted, the Plaintiffs will be denied access to justice in a timely manner since the allegations in the plaint and counterclaim are yet to be heard.

5. In his submissions filed on 21<sup>st</sup> October, 2020, the 1<sup>st</sup> Defendant/Applicant submitted that in the event that enforcement of the injunctive orders dated 29<sup>th</sup> September, 2017 is granted by this Court, then it would mean that the 1<sup>st</sup> Defendant will be evicted from his property. That such eviction would not be in tandem with the rules of natural justice and the Constitution since neither the Plaintiffs’ claim nor the 1<sup>st</sup> Defendant’s counterclaim have gone to hearing thus far. For his contention that the parties must be heard fully at the trial of the main suit and that the subject matter of the suit ought to be preserved, the 1<sup>st</sup> Defendant relied on the following Court of Appeal authorities: -

i) **Ougo & another -Vs- Otieno [1987] KLR 1;**

ii) **Savings and Loan Kenya Ltd -Vs- Odongo [1987] KLR 294;**

iii) **Mugah -Vs- Kaunga [1988] KLR 748.**

6. Lastly, on his submission that the enforcement of the injunctive orders ought to be stayed on account of the pending appeal before the Court of Appeal, the 1<sup>st</sup> Defendant relied on the case of **Regnoil Kenya Limited -Vs- Winfred Njeri Karanja [2019] eKLR.**

7. The Plaintiffs/Respondents countered with their submissions filed in court on 3<sup>rd</sup> February, 2020. They have identified the issues for determination in the application as namely: -

i) ***Whether the appeal is arguable.***

ii) ***Whether the Plaintiffs/Respondents will suffer prejudice if the application is allowed.***

8. In respect of the first issue, the Plaintiffs/Respondents submitted that the 1<sup>st</sup> Defendant/Applicant has not annexed the Memorandum of Appeal before the Court of Appeal in order to support a finding that the Applicant has an arguable appeal. On the second issue, the Plaintiffs submitted that following the dismissal of the application dated 22<sup>nd</sup> November, 2017 the 1<sup>st</sup> Defendant has unlawfully proceeded into the suit property and started destroying developments thereat. It was also submitted that granting the application will delay the hearing of the main suit. The Plaintiffs relied on the case of **Manchar Singh Sagoo & another -Vs- Caroline Njeri Mwicigi & 3 others [2018] eKLR.**

9. I have perused the pleadings herein. In my view the issues for determination in this application are: -

i) ***Whether sufficient cause has been demonstrated by the 1<sup>st</sup> Defendant/Applicant to merit stay of these proceedings.***

ii) ***Whether application for stay of the orders dated 29<sup>th</sup> September, 2017 is properly before this Court.***

10. An order of stay of proceedings is a serious judicial action which seriously interferes with the conduct of any litigation. The jurisdiction to grant an order for stay pending of proceedings is anchored to Order 42 Rule 6(1) of the Civil Procedure Rules, 2010. It is a discretionary power which must be exercised judiciously and only in exceptional circumstances. The said Rule states as follows: -

**6.(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.**

11. I have no reason to doubt that the 1<sup>st</sup> Defendant filed **Nairobi Court of Appeal Civil Appeal No. 160 of 2019 (Jackson Mutua Kavila - Vs- Christopher Ndolo Mbuta & Annah Ndolo Mbuta)** challenging the Ruling delivered on 6<sup>th</sup> December, 2018. Nonetheless, I fully agree with the findings of Ringera, J. (as he then was) in **Re Global Tours & Travel Ltd HCWC No. 43 of 2000** wherein the learned judge held that: -

***“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 case, 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.”*

12. The above considerations by Ringera, J. are not exhaustive. They do however, provide a sufficient starting point to what may inform the Court’s discretion in such an application. To further buttress the above position, an excerpt from **Halsbury’s Laws of England, 4<sup>th</sup> Edition Vol. 37 page 330 and 332**, is quite relevant. It states 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 application 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.”*

13. At this moment, the 1<sup>st</sup> Defendant/Applicant is obviously dissatisfied with the Ruling delivered on 6<sup>th</sup> December, 2018 dismissing his motion to discharge the orders of injunction dated 29<sup>th</sup> September, 2018 and hence, the pending appeal. I did not have the benefit of assessing the memorandum of appeal and so I am bereft of the opportunity to extend my thoughts on the arguability thereof. I have taken note of the fact that this suit was filed in 2016 and besides the parties herein, the 4<sup>th</sup> and 5<sup>th</sup> Defendants represented by the Attorney General have filed a memorandum of appearance and a Statement of Defence dated 19<sup>th</sup> February 2019. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants’ Statement of Defence and 1<sup>st</sup> Defendant’s Counterclaim was filed on 20<sup>th</sup> June, 2016. One unavoidable question springs to mind; what special circumstances have delayed the substantive hearing of the main suit whose central issue for determination revolves around ownership of the suit properties?

14. In my view, the real tragedy of the matter is the prolonged hearing of the main suit. It is the numerous applications mainly filed by the Plaintiffs and the 1<sup>st</sup> Defendant which have plagued this matter from conclusion. Between them, they have filed no less than five applications since inception and even presently while these two applications were pending, another one was filed by the 1<sup>st</sup> Defendant. There is absolutely no shred of justification for such nuisance. Even more egregious is the intolerance to the right of the other Defendants to defend the claim and have the matter determined expeditiously. That aside, the final basis would have been for the 1<sup>st</sup> Defendant/Applicant to demonstrate that the Plaintiffs do not have a cause of action in law or equity or that the claim is frivolous in its entirety. It has not been done. I am therefore unconvinced as to the merit of the application for stay of these proceedings.

15. On the second issue for determination, I am somewhat taken aback at sight of the third prayer in the 1<sup>st</sup> Defendant’s application. It is all but a reproduction of the second prayer in the 1<sup>st</sup> Defendant’s application dated 22<sup>nd</sup> November, 2017 and which application I dismissed vide Ruling of 6<sup>th</sup> December, 2018. That Ruling is the subject of an ongoing appeal. I am keen not to encroach into the merits of that appeal. Nevertheless, it is calamitous on the 1<sup>st</sup> Defendant’s cause to raise an issue which I have already pronounced myself on previously in these proceedings. The nature of the calamity is that this Court is bound by the doctrine of *res judicata* lest I should embarrass myself by issuing inconsistent findings on an application which I fully heard on its merits.

16. Turning to the second application, it was filed by the Plaintiffs/Applicants vide Notice of motion dated 19<sup>th</sup> February, 2019. The following orders have been sought: -

i) Spent.

ii) The Officer Commanding Mtito Andei Station does enforce the Orders of 29<sup>th</sup> September, 2017 and restrains the 1<sup>st</sup> Defendant, his servants and/or agents from interfering with the suit properties being Land Parcels 912, 1160, 1902 and 2916 located within Mang’elele Settlement Scheme Kibwezi District within Makueni County.

iii) The costs of this application be borne by the 1<sup>st</sup> Defendant/Respondent.

17. The application is supported by the affidavit of Christopher Ndolo Mbuta based on grounds that the 1<sup>st</sup> Defendant/Respondent is acting in complete disregard of the Orders dated 29<sup>th</sup> September, 2017 issued by Justice O. Angote and is threatening the Plaintiffs using hired goons. That the 1<sup>st</sup> Defendant has blocked the Plaintiffs from accessing the suit properties and that it is in the interest of justice that the Officer Commanding Mtito Andei Station enforce the said orders.

18. Opposing the application, the 1<sup>st</sup> Defendant, Jackson Mutua Kavila filed a replying affidavit sworn on 19<sup>th</sup> June, 2019. He avered that the enforcement of the aforesaid Orders with the aid of the police is unlawful and unprocedural as it amounts to unlawful eviction. That he cannot be evicted from the suit property where he has occupied for over 25 years yet his counterclaim herein has not been heard. That he has since the dismissal of his application dated 22<sup>nd</sup> November, 2017 appealed to the Court of Appeal and the appeal is pending hearing and determination. That the Orders dated 29<sup>th</sup> September, 2017 have long lapsed and thus the application herein lacks merit.

19. In a further affidavit sworn by the 1<sup>st</sup> Plaintiff on 19<sup>th</sup> November, 2019, he deposed therein that the 1<sup>st</sup> Defendant does not reside in the suit properties and hence his allegations on being evicted are baseless. He deposed further that the injunctive orders are still in force since

this Court upheld them vide the Ruling delivered on 6<sup>th</sup> December, 2018.

20. In the Plaintiffs' submissions dated 3<sup>rd</sup> February, 2020, they submitted that it is among the functions of the police under Section 24 of the National Police Service Act to enforce compliance with court orders. They relied on the following cases: -

**i) Namu Wachira & 2 others -Vs- Njeru Wachira [2015] eKLR;**

**ii) Claire Adamba Okanga -Vs- Godfrey Gichuki Waiharo Civil Appeal No. 69 of 2012 (at Nairobi)**

21. The 1<sup>st</sup> Defendant filed submissions dated 14<sup>th</sup> October, 2020. He is adamant that the Order does not specify that he is to be evicted from the suit property. That the Plaintiffs ought to have commenced contempt of court proceedings under Order 40 if the 1<sup>st</sup> Defendant had breached the injunctive orders. Lastly, it is submitted that the application is frivolous and an abuse of the court process.

22. I have assessed the rival submissions. I have taken note of the fact that the injunctive Order being sought to be enforced was issued on 29<sup>th</sup> September, 2017. My finding is that by operation of Order 40 Rule 6, the injunctive order lapsed on 29<sup>th</sup> September, 2018. Order 40 Rule 6 provides as follows: -

***“Where a suit in respect of which an interlocutory injunction has been granted is not determined within a period of twelve months from the date of the grant, the injunction shall lapse unless for any sufficient reason the court orders otherwise.”***

23. I have seen no evidence on the record to prove that the Order was extended on the application of either party. Clearly, both applications are unmeritorious and I shall proceed to dismiss them with each party bearing their own costs. At this juncture, this Court will ameliorate the conundrum herein by exercising the inherent powers donated under Section 3A of the Civil Procedure Act, which both parties have invoked. The Orders which commend themselves are as follows: -

**i) An Order of open access to the suit properties is hereby issued to both the Plaintiffs and the 1<sup>st</sup> Defendant provided that neither party shall be at liberty to develop, destroy, demolish any structure and/or otherwise dispose of any part of the suit properties until this matter is fully heard and determined.**

**ii) All pending applications are hereby stayed.**

**iii) Matter to proceed for pretrial directions and a hearing date to be issued on priority basis.**

24. Orders accordingly.

**SIGNED, DATED AND DELIVERED AT MAKUENI VIA EMAIL THIS 2<sup>ND</sup> DAY OF SEPTEMBER, 2021.**

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**MBOGO C.G.**

**JUDGE**

**Court Assistant: Mr. Kwemboi**