



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC NO. 856 OF 2017

(FORMERLY ELC CASE NO. 1363 OF 2013)

AMOS KIBATA GITHEKO.....PLAINTIFF/APPLICANT

VS

LOISE GACHIKU KINUTHIA.....1ST DEFENDANT/RESPONDENT

HON. ATTORNEY GENERAL.....2ND DEFENDANT/RESPONDENT

THE LAND REGISTRAR – KIAMBU.....3RD DEFENDANT/RESPONDENT

JOSEPHAT GACHERU RUGIRI.....4TH DEFENDANT/RESPONDENT

RULING

1. By way of background the Plaintiff sued the 1st Defendant seeking inter alia eviction orders and a permanent injunction restraining the 1st Defendants from the suit land (Kabete/Kabete/47 – and its later subdivisions). In resisting the Plaintiff's claim the 1st Defendant filed a defence and a counterclaim against the Plaintiff and enjoined the 2nd -4th Defendants. The 1st Defendant sought among other orders a declaration that she is the rightful beneficial and/or owner of the suit land.
2. The Court heard the suit and on 18th March 2021, the Plaintiff/Applicant's suit was dismissed and judgement entered in favour of the 1st Defendant/Respondent pursuant to her counterclaim. The Court *inter alia* declared the 1st Defendant/Respondent the rightful owner of land parcel No. Kabete/Lower Kabete/47.
3. Dissatisfied with the outcome, the Applicant filed the Notice of Appeal on the 29/3/2021 on the whole judgement of the Court.
4. Similarly, the 4th Defendant being equally dissatisfied with the judgement filed a notice of appeal on the 22/3/2021.
5. On the 24/5/2021 the 4th Defendant also filed an application seeking stay of execution of the judgement and the orders of the trial Court delivered on the 18/3/2021 pending the hearing and determination of the appeal. In the alternative he sought injunctive orders against the 1st Defendant restraining her from trespassing, selling or disposing the suit land pending the hearing of the appeal.
6. The Court of Appeal declined to certify the application dated the 24/5/2021 urgent and directed the parties to file written submissions within 30 days. See LGK2E dated the 26/5/2021.
7. According to the written submissions of the 1st Defendant all the parties have filed written submissions with respect to the said application in the Court of Appeal and are awaiting directions on the ruling.
8. The Applicant in addition to the notice of appeal chose the trial Court as the forum for his application for stay of execution of the judgement of the Court delivered on the 18/3/2021.
9. The application is the instant motion which sought the following orders;

a. Spent

b. Spent

c. **THAT** pending the determination of this Application, this Honourable Court be pleased to grant a stay of execution of its Judgment dated 4th March 2021 and delivered on 18th March 2021 and the resultant decree thereof.

d. **THAT** this Honourable Court be pleased to grant a stay of execution of its Judgment dated 4th March 2021 and delivered on 18th March 2021 and the resultant decree thereof pending the hearing and determination of the intended appeal or on such other terms as the Court may deem just.

e. **THAT** the costs of this application abide the outcome of the intended appeal.

10. The application is premised on the grounds set out and annexed thereto and the supporting affidavit of the Applicant deponed on the 13/5/2021. Inter alia the Applicant argues that the cancellation of the transfer and titles amounts to an impeachment of the agreement for sale between himself and the 4th Defendant. That he risks a claim for refund and interest to the tune of Kshs 50 Million from the 4th Defendant. Further that the 1st Defendant is likely to tax and execute for costs. That if paid the 1st Defendant being a person of straw is unlikely to repay back the costs in the event that the appeal succeeds. In addition, he states that he has a strong case on appeal and if the orders are not granted his appeal will be rendered nugatory. That the substratum of the appeal risks being removed if the orders are denied. The possibility of the 1st Respondent disposing the suit land is also imminent should the title be registered in her name. That the 1st Respondent does not reside on the suit land and so suffers no prejudice.

11. Contemporaneous to opposing the said Application, the 1st Respondent filed a Notice of preliminary objection dated 4/6/2021 on grounds that;

a. That the Applicant and the 4th Defendant have each moved the Appellate Court by filing respective Notice of Appeal thereby effectively invoking the jurisdiction of the Appellate Court and thus ousting that jurisdiction of this Honorable Court, in hearing the Application before this Court.

b. That the 4th Defendant has further already moved the Appellate Court with a similar application for stay of the judgement of this Court whereby the Court of Appeal has already made preliminary directions on the same and which facts are well known to the Applicant herein. The Applicant is thus seeking to have two parallel proceedings in two Courts over the same subject matter. This is an abuse of Court process.

12. The 1st Defendant also opposed the application dated the 13/5/2021 via the Replying Affidavit and argued that the Applicant is guilty of undue delay having filed the application two months later. That the Applicant having invoked the jurisdiction of the Court of Appeal ought to file the application in the appellate Court. That the Applicants associate, the 4th Defendant has filed a similar application before the Court of appeal which application the Court has given directions as to the filing of written submissions. That the Applicant failed to disclose this to the Court. He accused the Applicant of approaching the Court with unclean hands by concealing information and thereby abusing the Court process.

13. The 4th Defendant supported the Plaintiffs application vide his affidavit deponed on the 4/6/2021. He stated that if the application is not granted the suit land stands the risk of being disposed by the 1st Defendant. He urged the Court to order status quo. He disclosed to the Court that he too had filed a notice of appeal and an application for stay before the Court of appeal for which directions had been given.

14. On the 9/6/2021 directions were given by the Court to the effect that the Preliminary objection and the Notice of Motion dated the 13/5/2021 will be canvassed together.

15. All the parties have filed written submissions which I have read and considered.

16. The key issues for determination are;

a. Whether the preliminary objection is merited

b. Whether the Applicant is entitled to the orders of stay of execution.

c. costs

17. I will determine the objection first and should it succeed, then the application will be spent and vice versa.

18. The starting point is to evaluate what constitutes a preliminary objection. All the parties are agreed on the celebrated case of **Mukisa Biscuits Manufacturing Co Ltd Vs West End Distributors Ltd (1969) EA 696** on the definition of preliminary objection which is stated as follows; -

“...a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration ... a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the

exercise of judicial discretion.”

19. It is the Applicant’s case that the Applicant and the 4th Defendant have invoked the jurisdiction of the Court of appeal by filing their respective appeals thus ousting the jurisdiction of this Court.

20. The 4th Defendant disclosed in his replying affidavit sworn on the 7/6/2021 that he had filed an appeal as well as an application for stay of execution at the Court of appeal pending the hearing and determination of the substantive appeal. It is therefore not true that the 4th Defendant concealed this fact to this Court. The allegations of concealment and material non-disclosure do not hold water.

21. In the Court of Appeal, the 4th Defendant’s application seeks two prayers; stay of the judgment delivered on the 18/3/2021 pending the hearing and determination of the appeal. Secondly an alternative order of interim injunction restraining the 1st Defendant from taking possession, selling, transferring the suit lands pending the hearing and determination of the appeal.

22. The orders sought by the 4th Defendant in the Court of appeal are similar to the orders sought by the Applicant in the trial Court. Both are aimed at obtaining stay of execution of the orders of this Court delivered on the 18/3/2021.

23. Order 42 rule 6 of the Civil Procedure Rules provides as follows;

“(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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.

.....”

24. Going by the above provision of the law, it is clear that it is open to a party to file stay of execution proceedings in the trial Court (Court appealed from) or the appellate Court (Court appealed to). In this case the Applicant chose the trial Court as the forum for his application while the 4th Defendant elected to file it in the Court of appeal. Each of the parties rightly invoked the jurisdictions of the Courts they elected. Nothing in my view turns on this ground and the objection on this account fails.

25. The second limb of the objection is that the application for stay of execution is subjudice on account of a similar application filed by the 4th Defendant and pending in the Court of Appeal.

26. Section 6 of the Civil Procedure Act is couched in mandatory terms as follows;

“No Court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other Court having jurisdiction in Kenya to grant the relief claimed”.

27. It is admitted by the 4th Defendant that he filed a similar application in the appellate Court that is to say Application No. E165 of 2021. It is evident from the record that the two applications involved the same parties, subject matter and arising from the decision (same judgment) of this Honourable Court.

28. The question that needs to be answered is whether the decision of the Court of Appeal will settle the current application. The relief being sought in both applications is a stay of execution of the judgement. The application in the appellate Court is before a competent Court empowered to grant the relief sought. The answer therefore is yes.

29. It is clear from the evidence on record that the matter in the Court of appeal is awaiting directions on ruling. I agree with the 1st Respondent that the matter before the Court touches on same parties, same subject parties and seek same orders and therefore certainly offends the doctrine of Sub Judice.

30. Is the application an abuse of the process of the Court? Black’s Law Dictionary defines abuse of the process of the Court as everything which is contrary to good order established by usage that is a complete departure from reasonable use. An abuse is done when one makes an excessive or improper use of a thing or to employ such thing in a manner contrary to the natural legal rules for its use.

31. In the case of **Satya Bhama Gandhi v Director of Public Prosecutions & 3 others [2018] eKLR** the Court held that ;

“The concept of abuse of Court/judicial process is imprecise. It involves circumstances and situation of infinite variety and conditions. It is recognized that the abuse of process may lie in either proper or improper use of the judicial process in litigation. However, the employment of judicial process is only regarded generally as an abuse when a party improperly uses the issue of the judicial process to the irritation and annoyance of his opponents.”[\[12\]](#)

32. The situation that may give rise to an abuse of Court process are indeed in exhaustive, it involves situations where the process of Court

has not been or resorted to fairly, properly, honestly to the detriment of the other party. However, abuse of Court process in addition to the above arises in the following situations: -

- (a) Instituting a multiplicity of actions on the same subject matter, against the same opponent, on the same issues or multiplicity of actions on the same matter between the same parties even where there exists a right to begin the action.
- (b) Instituting different actions between the same parties simultaneously in different Court even though on different grounds.
- (c) Where two similar processes are used in respect of the exercise of the same right for example a cross appeal and Respondent notice.
- (d) Where an application for adjournment is sought by a party to an action to bring another application to Court for leave to raise issue of fact already decided by Court below.
- (e) Where there no iota of law supporting a Court process or where it is premised on recklessness. The abuse in this instance lies in the inconvenience and inequalities involved in the aims and purposes of the action.
- (f) Where a party has adopted the system of forum-shopping in the enforcement of a conceived right.
- (g) Where an appellant files an application at the trial Court in respect of a matter which is already subject of an earlier application by the Respondent at the Court of Appeal.
- (h) Where two actions are commenced, the second asking for a relief which may have been obtained in the first. An abuse may also involve some bias, malice or desire to misuse or pervert the course of justice or judicial process to the irritation or annoyance of an opponent.

33. In the same case, the Court while quoting the case of **Agwusin vs Ojichie** stated as follows;

“that abuse of Court process create a factual scenario where appellants are pursuing the same matter by two Court process. In other words, the appellants by the two Court process were involved in some gamble a game of chance to get the best in the judicial process.”

34. In the instant case the Applicant and the 4th Defendant are pursuing the same application by two Court processes, in the trial Court and the appellate Court. It is the multiplicity of suits or proceedings that is an assault to the fair administration of justice. The actions of the parties in pursuing parallel proceedings in two Courts amounts to abuse of the process of the Court.

35. The Court is empowered under section 3A of the Civil Procedure Act to make such orders as may be necessary for the ends of justice or to prevent the abuse of the process of the Court. Further there is need to avoid conflicting decisions emanating from the trial and the appellate Court on a similar issue.

36. Having read and considered the application Preliminary objection, the rival affidavits and the written submissions, it is the conclusion of the Court that the Preliminary objection is merited. The same is upheld.

37. Having upheld the Preliminary objection, the notice of motion dated the 24/5/2021 is hereby struck out.

38. Costs shall be in favour of the 1st Respondent.

39. It is so ordered.

DELIVERED, DATED AND SIGNED AT THIKA THIS 28TH DAY OF OCTOBER 2021 VIA MICROSOFT TEAMS.

J. G. KEMEI

JUDGE

Delivered online in the presence of:

No appearance for the Plaintiff/Applicant

Ms. Kagoi for the 1st Defendant/Respondent

No appearance for the 2nd and 3rd Defendant/Respondent

Masore Nyang'au for the 4th Defendant/Respondent

