



THE REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. E015 OF 2021

QUINVEST LIMITED.....PLAINTIFF

VERSUS

MARGARET GACIGI GECAGA.....DEFENDANT

RULING

1. The plaintiff, Quinvest Limited, took out an originating summons dated 31/3/2021, seeking the following verbatim orders against the defendant:-

- a) A mandatory injunction do issue to compel the defendant to immediately vacate Thomar Hall situated on LR. No. 214/721, Muthaiga, Nairobi (“the property”) and deliver vacant possession to the plaintiff, failing which an eviction order should issue.*
- b) The defendant to pay to the plaintiff mesne profits at the rate of Kshs 500,000 per month from 1st January 2017 to the date of giving up possession of the property.*
- c) The defendant to pay interest on the amount in (b) at court rates.*
- d) The defendant pays the costs of the suit.*

2. Their case was that they were the registered proprietors of Land Reference Number 214/721 situated in Muthaiga, Nairobi. They contended that the plaintiff who is a widow of the late Dr Bethuel Mareka Gecaga (**the deceased**) lived in the suit property with the deceased because the deceased was a tenant of the plaintiff. The lease came to an end upon the death of the deceased in 2016. The plaintiff had persisted in staying in the suit property without paying any rent.

3. The plaintiff added that the defendant initiated Nairobi ELC No 547 of 2011 alleging that transfer of the suit property to the plaintiff was procured fraudulently. The dispute was referred to arbitration and the arbitral tribunal rendered an award in favour of the plaintiff. The defendant subsequently attempted to set aside the award but the High Court (Nzioka J) rejected the defendant’s application. The defendant thereafter filed an appeal against the ruling of Nzioka J and the appeal was still pending in the Court of Appeal.

4. The plaintiff added that there subsisted **Nairobi High Court Succession Cause Number 937 of 2017; In the Matter of the Estate of Bethuel Mareka Gecaga** in which the defendant was attempting to make the suit property the subject of the succession cause yet it did not form part of the estate of the deceased. They contended that as at June 2021, the plaintiff had lost rental income equivalent to Kshs 27,000,000.

5. Subsequently, the defendant brought a notice of motion dated 7/5/2021 under Sections 3A and 6 of the Civil Procedure Act, seeking an order staying this suit pending the hearing and final determination of Nairobi High Court Succession Cause No. 937 of 2017. The said application is the subject of this ruling. The application was supported by the defendant’s affidavit sworn on 7/5/2021 and supplementary affidavit sworn on 31/5/2021. Her case was that the suit property was initially registered in her late husband’s name and was their matrimonial home where they lived up to the time of his death in 2016. The suit property was fraudulently transferred to the plaintiff company by Udi Mareka Gecaga. The plaintiff company was incorporated by her late husband in the 1970s and her late husband held majority shares in the company. The estate of her late husband was yet to be distributed. The fate of the suit property and the inheritance thereof by virtue of the deceased’s majority shareholding in the plaintiff company was thus substantially in issue in the succession proceedings relating to the estate of her late husband. The succession court was the proper court vested with jurisdiction to dispose issues relating to shares of the deceased in the plaintiff company. She contended that this suit was brought prematurely, maliciously, and with ulterior motives.

6. The plaintiff opposed the application through grounds of opposition dated 13/5/2021 and a replying affidavit sworn on 18/5/2021 by Udi Mareka Gecaga. The plaintiff contended that the application was an attempt to re-litigate issues that had been determined by the arbitral tribunal and violated **Section 10** of the **Arbitration Act**.

7. The application was canvassed through written submissions dated 3/6/2021, filed through the firm of J. M. Njenga & Co Advocates. Counsel submitted that there was an abuse of the court process by the plaintiff because the issue in this suit was substantively the same as the issue in the succession cause and the succession cause subsisted prior to the initiation of the present suit. Counsel cited the provisions of **Section 6** of the **Civil Procedure Act** and the decisions in **Benja properties Ltd v Savings & Loans Ltd [2005]eKLR** and **Daniel Otieno Advocates v Hardware Tracing Stars Ltd & ano [2010] eKLR** and urged the court to grant the prayers sought in the application.

8. The plaintiff filed written submissions dated 4/6/2021 through the firm of *Hamilton Harrison & Mathews*. They submitted that the only issue for determination was whether the matters in this suit were subjudice as set out in Section 6 of the Civil Procedure Act. Counsel submitted that the issues in this suit were not subjudice. Counsel added that the defendant's contention that the matters raised in this suit were directly in issue in the cause before the succession court was inaccurate because the three issues in the succession cause related to the composition of the assets of the late Dr. Bethuel Mareka Gecaga; the bonafide beneficiaries of the said estate; and the mode of distribution of the estate. Counsel added that the arbitral tribunal had already determined that the suit property did not form part of the estate of the late Dr. Bethuel Mareka Gecaga. Counsel contended that in the circumstances, any issue relating to the use and occupation of the suit property was for adjudication by this court and not by the succession court.

9. I have considered the application together with the response thereto and the parties' respective submissions. The key question falling for determination in this application is whether the applicant has met the criteria upon which an order of stay of proceedings is granted pursuant to **Section 6** of the **Civil Procedure Act**.

10. Section 6 of the Civil Procedure Act provides as follows:

"6. Stay of suit

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. Explanation.—The pendency of a suit in a foreign court shall not preclude a court from trying a suit in which the same matters or any of them are in issue in such suit in such foreign court."

11. Through the originating summons herein, the plaintiff seeks an order compelling the defendant to vacate the suit property and to pay the plaintiff *mesne profits* of Kshs 500,000 per month from 1/1/2017. The plaintiff is the registered proprietor of the suit property. The dispute relating to transfer of the suit property to the plaintiff company was determined by the arbitral tribunal. The plea for stay is not premised on the pending appeal against the decision of Nzioka J. The plea for stay is premised on the pending succession cause. The issues for determination in the succession cause relate to: (i) the assets that comprise the estate of the late Dr. Bethuel Mareka Gecaga; (ii) the bonafide beneficiaries of the estate of Dr. Bethuel Mareka Gecaga; and (iii) the mode of distribution of those assets.

12. Taking the above into account, it is my view that staying this suit without substantively hearing the parties on the question as to whether or not the defendant is entitled to occupy and/or use the suit property for free would occasion injustice to the registered proprietor of the suit property. The plaintiff company is the registered proprietor. The plaintiff company is not a party to the succession cause. At this point, the defendant has not categorically advanced any reason why she should be allowed to occupy the suit property for free. The forum available to her to tender that explanation is this suit.

13. Secondly, the grounds upon which the defendant seeks a stay order are grounds which she will have the opportunity to canvass at the substantive hearing of the originating summons herein. The trial court will be obligated to consider those grounds when the question as to whether the plaintiff is entitled to the orders sought in the originating summons fall for determination.

14. For the above reasons, it is my view that granting an order of stay of proceedings in the circumstances of this suit would occasion prejudice to the plaintiff company which is the registered proprietor of the suit property and which is entitled to rental income from the suit property regardless of its shareholding.

15. In light of the foregoing, the defendant's application dated 7/5/2021 is rejected. Costs of the application shall be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 8TH DAY OF OCTOBER 2021

B M EBOSO

JUDGE

In the Presence of: -

Mr Owiti holding brief for Mr Kirago Kimani for the Plaintiff

Ms Wambua holding brief for Mr Njenga for the Defendant

Court Assistant: Lucy Muthoni

NOTE:

This application was heard and a ruling date fixed when I was stationed at Nairobi (Milimani) Environment and Land Court Station. Subsequent to that, I was transferred to Thika Environment and Land Court Station. This is why I have delivered the ruling virtually from Thika.

B M EBOSO

JUDGE