



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAJIADO

ELC. APPEAL NO. E013 OF 2021

NJOKI KIMANI.....1ST APPELLANT

KIMANI NJOKI.....2ND APPELLANT

NDARUA NJOKI.....3RD APPELLANT

MUNGAI NJOKI.....4TH APPELLANT

VERSUS

JACOB MWANTO WANGORA.....RESPONDENT

RULING

What is before Court for determination is the Appellants' Notice of Motion application dated the 15th April, 2021 brought pursuant to Sections 1A, 1B & 3A of the Civil Procedure Rules and Order 42 Rule 6(1) of the Civil Procedure Rules. The Appellants seeks for stay of proceedings in *Ngong ELC No. E015 of 2020 Jacob Mwanto Wangora V Njoki Kimani & 3 Others* pending the hearing and determination of this Appeal.

The application is premised on the grounds on the face of it and the supporting affidavit of the 2nd Appellant KIMANI NJOKI where he deposes that the Respondent herein filed a suit and application in *Ngong ELC No. E 015 of 2020 Jacob Mwanto Wangora V Njoki Kimani & 3 Others* where he sought various orders arising out of a boundary dispute between the parties herein which dispute the Respondent also referred to the Land Registrar, Ngong Land Registry prior to filing this suit. He confirms filing a Notice of Preliminary Objection in the said suit challenging the jurisdiction of the Court to hear and determine the said suit which objection was dismissed by the lower court on 18th March, 2021. He explains that being dissatisfied with the said Ruling, they filed an Appeal together with this instant Application seeking to have the Ruling set aside as the Court did not have jurisdiction to hear and determine the suit as filed by the Respondent herein until the boundary dispute, which is already pending before the Land Registrar, Ngong Land Registry is determined. He contends that after the impugned Ruling, the Honourable Magistrate set the matter for mention on 29th April, 2021 with a view to setting down the suit for hearing and unless a stay of proceedings is issued, the Court will proceed to hear as well as determine the said matter while the Appeal is still pending, rendering the same nugatory. Further, the Appeal has high chances of success. He reiterates that no prejudice will be visited upon the Respondent.

The application was opposed by the Respondent who filed a replying affidavit where he confirms being the registered proprietor of land title comprised in numbers NGONG/NGONG/3079 and NGONG/NGONG/3080 which he combined into land title number NGONG/NGONG/96381 and thereafter subdivided the same, into eighteen (18) parcels of land being NGONG/NGONG/ 97405 upto 97422. He explains that parcel of land NGONG/NGONG/9166 shares a common boundary with ten (10) of his parcels of land namely NGONG/NGONG/97405 upto NGONG/NGONG/97414 which has been in place since the 1970s and consisted of an *euphorbia rechmata* hedge interspersed with mature trees. He avers that on 26th October, 2020, the Appellants or their agents trespassed on his land and unlawfully erected an iron sheet fence about six (6) metres inside the said land. He states that on 2nd November, 2020, he wrote to the Land Registrar, Kajjido, Kajjido North (Ngong) Land Registry reporting the emerging boundary dispute and requesting for his intervention in fixing the original boundary. Further, upon receipt of the said letter, he was advised to await a date to fix the said boundary. He contends that on 18th November, 2020 the Appellants interfered with the boundary features along his ten (10) parcels of land and cut the edge marks thereon. Further, on 19th November, 2020, the Appellants accompanied with armed thugs caused damage to his parcels of land and threatened to kill his farm hand. He explains that he duly reported matter to the Ongata Rongai Police Station vide OB No. 70/27/10/2020, 14/20/11/2020 and 56/21/11/2020, who claimed they could not act in absence of a court order. Further, he sought intervention of the area chief but it was in vain and on 15th December, 2020, he instituted the lower court suit being *Ngong ELC No. E 015 of 2020 Jacob Mwanto Wangora V Njoki Kimani & 3 Others* seeking injunctive reliefs but the Appellants never filed a Defence and only filed a Notice of Preliminary Objection which was heard as well as determined. He reiterates that after the determination of the Notice of Preliminary Objection, the Honourable

Magistrate set the suit down for mention to await the boundary dispute resolution. Further, he opposes the instant application as the Applicants are still in contempt of the orders of the court.

The application was canvassed by way of written submissions.

Analysis and Determination

Upon consideration of the Notice of Motion application dated the 15th April, 2021 including the respective affidavits and submissions, the only issue for determination is whether the proceedings in *Ngong ELC No. E 015 of 2020 Jacob Mwanto Wangora V Njoki Kimani & 3 Others*, should be stayed pending the outcome of this Appeal.

The Appellants in their submissions reiterated their claim and insist they have a prima facie and arguable case. Further, that the instant application was filed expeditiously and they have established a sufficient cause to warrant the granting of the orders sought. To buttress their averments, they have relied on the following decisions: *Global Tours & Travels Limited; Nairobi HC Winding Up Cause No. 43 of 2000; Kenya Power & Lighting Co. Ltd Vs Esther Wanjiru Wokabii Civil Appeal No. 326 of 2013 (2014) eKLR; and Ezekiel Mulee Musembi V H. Young & Company (EA) Limited (2019) eKLR.*

The Respondent in his submissions contended that it was not in the interest of justice to stay the proceedings in the lower court. Further, the Appellants do not have an arguable Appeal. He reiterated that the expenditure of time and effort taken in the Appeal would not be optimum utilization of judicial resources and time. To buttress his averments he relied on the following decisions: *Global Tours & Travels Limited; Nairobi HC Winding Up Cause No. 43 of 2000* and *Kenya Power and Lighting Co. Ltd vs. Esther Wanjiru Wokabi (2014) eKLR.*

The legal provision governing stay of proceedings is contained in Order 42, rule 6 (1) of the Civil Procedure Rules which stipulates that: **‘(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. (2) No order for stay of execution shall be made under subrule (1) unless— (a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and (b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.’**

In this instant application, the Appellant has sought for stay of proceedings in *Ngong ELC No. E 015 of 2020 Jacob Mwanto Wangora V Njoki Kimani & 3 Others* which was vehemently opposed by the Respondent. The gist of this matter is that the Appellants having been aggrieved with the Learned Magistrate’s Ruling which dismissed its Notice of Preliminary Objection, sought to Appeal the same and is now seeking for the proceedings in the lower court to be stayed pending outcome of the said Appeal. The provisions of Order 42 Rule 2 of the Civil Procedure Rules which I have cited above are clear in terms of the conditions a party seeking a stay of proceedings pending appeal should fulfill and these include: demonstration of substantial loss; application has been filed without unreasonable delay and provision of such security as the court orders for the due performance of such decree or order.

In the case of *Global Tours & Travels Limited; Nairobi HC Winding Up Cause No. 43 of 2000* Ringera J as he then was heard this to say on staying proceedings pending appeal;

“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”

In the current scenario, the Appellants only filed the Notice Preliminary Objection in the Lower Court file where they were Defendants but did not file a Defence to deny the Respondent (Plaintiff’s) averments therein.

In the case of *Independent Electoral and Boundaries Commission V Jane Cheperenger & 2 Others Civil Application No. 36 of 2014*, the Supreme Court reiterated the principles set out in the aforementioned case and held as follows: **‘A preliminary objection consists of a point of law which has to be pleaded or which arises by clear implication out of the pleadings and which if argued as a preliminary point may dispose of the suit.....it cannot be raised if any fact has to be ascertained of if what is sought is the exercise of judicial discretion.’**

While in the case of *Avtar Singh Bhamra & Another Vs Oriental Commercial Bank, Kisumu HCCC No.53 of 2004*, the Court held that: **“A Preliminary Objection must stem or germinate from the pleadings filed by the parties and must be based on pure points of law with no facts to be ascertained.”**

Insofar as the Appellants insist the Court should stay proceedings pending the outcome of the Appeal from the impugned Ruling which declined to strike out the said suit on the grounds that it was a boundary dispute that had to be determined by the Land Registrar first before being filed in court, I note in the Plaintiff’s prayers were sought. Further, the Appellants never controverted the Respondent’s averments in the Plaintiff’s Defence. I opine that they should have filed a Defence to expressly deny the Plaintiff’s averments first to anchor their Preliminary Objection. Insofar as the instant application was filed within a timely period, I note the Appellants never filed a Defence in the

suit sought to be stayed and as it stands, the said suit is undefended. It is my considered view that staying the said case would hamper the expeditious disposal of the lower court case. Further, I will refer rely on the case of **Edward Sargent V Chotabha Jhaverbhat Patel (1949) 16 EACA 63**, and hesitate to deem the said Appeal arguable on this point.

In the circumstances, while relying on the legal provisions cited above as well as the associating myself with the decisions cited, I find the Appellants have not met the threshold set for staying proceedings and I opine that the issues it is raising can be dealt with when the lower court suit will be heard and determined.

It is against the foregoing that I find the Notice of Motion application dated the 15th April, 2021 unmerited and will dismiss it with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 22ND DAY OF NOVEMBER, 2021

CHRISTINE OCHIENG

JUDGE