



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

MISCELLANEOUS CIVIL APPLICATION NO. E18 OF 2021

SAMSON KIMATHI.....1ST APPLLCANT

JOSHUA MUTWIRI.....2ND APPLICANT

BERNARD KINYUA.....3RD APPLLCANT

GEOFFREY KINOTI.....4TH APPLICANT

VERSUS

ARTHUR MATHEW RAPHAEL MUTHURI

JULIA GAITI MUTHURI T/A KARIBU DIAPERS.....RESPONDENTS

RULING

Introduction

1. Before the Court is a Notice of Motion dated 2nd November 2020 seeking the following orders: -

i) Spent

ii) THAT the Honourable Court be pleased to stay proceedings in Githongo Civil Suit No. 20 of 2019 pending the hearing and determination of this application.

iii) THAT the Honourable Court be pleased to transfer Civil Suit No. 20 of 2019 from Githongo Senior Resident Magistrate Court to the Chief Magistrate Court at Meru for hearing and determination.

iv) THAT costs of the application be provided for.

2. The Application is supported by the grounds set out in the application and the facts deponed in the supporting affidavit of Samson Kimathi sworn on 2nd November 2020.

The Applicant's case

3. The Applicants contend that they have been sued by the Respondents in Githongo ELC Case No. 20 of 2019 for general damages for malicious damage to property and that there is a pending criminal case namely Meru Criminal Case No. 439 of 2017 where they have been charged with the offence of incitement to violence and malicious damage to property belonging to the Respondents. They contend that the ELC suit stems from the criminal charges in Criminal Case No. 439 of 2017 and further, that the Respondents are relying on the criminal charges in support of their civil suit. They contend that in paragraph 10 of their Complaint, the paragraph on addressing the *res judicata* principle, that the Respondents failed to disclose to the Court the existence of the criminal matter. They contend it being that the criminal suit and the civil suit are based on the same facts, and it being that the criminal trial forms the basis of the civil suit, then the ELC proceedings must be stayed until the criminal case is fully heard and determined.

4. They contend that they intend to rely on the criminal proceedings in support of their defence in the civil suit and that should they be forced to proceed with the civil suit in the pendency of the criminal case, their case will be greatly compromised. They contend that in as long as

they have not been found guilty of the criminal charges pressed against them, they should not be condemned to pay any damages in the civil suit. They contend that the civil suit ought to be stayed since it was filed in 2019 whereas the criminal case is for 2017 which forms part of the backlog that the judiciary is keen on clearing. They contend that there is sufficient reason to stay the proceedings in the civil suit.

The Respondent's case

5. The Respondents opposed the application by the replying affidavit sworn by Christine Muriithi on 14th December 2020. They contend that the Applicants' Application is frivolous, vexatious and a gross abuse of the Court process and ought to be dismissed forthwith. They state that they instituted Githongo SRMCC No. 20 of 2019 vide a Plaint dated 27th June 2019 to which the Applicants responded to and filed a Statement of Defence dated 21st August 2019 and that both parties have complied with Order 11 of the Civil Procedure Rules, 2010 and that when the matter came up for pre-trial directions, the Applicants herein made an application to stay proceedings pending the hearing and determination of Meru Criminal Case No. 439 of 2017 which application was denied by a Ruling delivered by Hon. E. Ndegwa. It is contended that this decision refusing to stay the proceedings has neither been appealed nor reviewed. They further contend that the Plaintiff's case in the said suit was fully heard and closed on 9th October 2020 with the full participation of the Applicants and that by consent of parties, the Defence case is scheduled for hearing on 15th February 2021. They contend that the instant application is a delaying tactic for the reasons that the law Courts at Githongo have both pecuniary and geographical jurisdiction over the claim brought in the matter and that all parties are resident and domiciled in Githongo and that the Plaintiff's case has already proceeded to closure with the Defence case coming up soon on 15th February 2021. They contend that the instant application is not merited and it should be dismissed with costs.

6. Parties did not file any written submissions and they rely on the affidavits on record.

Issues for determination

7. There are two issues for determination in this Application: -

i) Whether Githongo SRMCC No. 20 of 2019 should be transferred to Meru Chief Magistrates Court.

ii) Whether the Civil Suit should be stayed pending hearing and determination of this application.

Determination

8. At the outset, this Court observes that the prayers as drafted in the application do not fully correspond to the issues raised in the substance of the affidavits. From the supporting affidavit, it appears that the Applicants mainly seek to have the Civil Suit stayed pending hearing and determination of Meru Criminal Case No. 439 of 2017. However, no such prayer has been made. Prayer 2 merely seeks for a stay pending hearing and determination of the application and not pending hearing and determination of the Criminal case. Whether this was by design or by mistake, is unclear.

9. Turning to the first issue, on whether the Court should order for a transfer of Githongo SRMCC No. 20 of 2019 to the Meru Chief Magistrates Court, this Court observes that most, if not all of the grounds in the Application lay out a case for stay of proceedings pending hearing and determination of the criminal case as opposed to a transfer. The Court will, however, assess whether there are any good grounds for transfer.

10. The Respondents' disclosure that the Applicants have previously made an application in the lower Court at Githongo the stay of proceedings in the civil suit pending hearing and determination of the criminal case. The Respondents aver that a decision on this application was rendered disallowing the request for stay. Although the Ruling with respect to this application was not availed, this Court notes that the Applicants did not rebut and/or dispute this averment. Significantly, this decision has not been challenged either by way of appeal and/or review.

11. Although the instant application has been posed as one seeking a transfer, this Court observes that an order of transfer may in a way achieve a similar result as an order for stay as it may become necessary to have a fresh trial and re-opening of the Plaintiff's case. Both ways, by transfer and/or by stay pending determination of the criminal matter, result in delay. This Court cannot ignore the fact that the Applicants herein, by filing this application may be making attempts at achieving through the back door, what they were seeking vide their now dismissed application for stay. The Applicants may be seeking to have the civil suit stayed and/or delayed without going through the trouble of appealing and/or reviewing the decision of the lower Court refusing to stay the proceedings therein. This, as rightly pointed out by the Respondents would be tantamount to abuse of Court process.

12. This material fact on a previous application for stay was not disclosed by the Applicants themselves. This Court finds that the Applicant approached this Court with material concealment. This Court takes this issue seriously considering that the Applicant ought to have appealed and/or reviewed the ruling of the lower Court refusing to stay the proceedings. As it stands, the said decision constitutes and remains a valid order which ought not be defeated by the instant application unless it is challenged through the proper channels of law.

13. Having said so, this Court observes nonetheless that Section 11, 17 and 18 of the Civil Procedure Act, Cap 21 Laws of Kenya gives the High Court jurisdiction to transfer suits if lawful grounds for doing so exist. This Court will, therefore, delve further into this issue. In doing so, this Court must assess whether the civil suit was in the first place filed in the proper Court. Section 11 to 18 of the Civil Procedure Act provides for the factors that guide a litigant on the Court in which to institute a case. Section 12 which relates to immovable property provides as follows: -

“Subject to the pecuniary or other limitations prescribed by any law, suits—

(a) for the recovery of immovable property, with or without rent or profits;

(b) for the partition of immovable property;

(c) for the foreclosure, sale or redemption in the case of a mortgage of or charge upon immovable property;

(d) for the determination of any other right to or interest in immovable property;

(e) for compensation for wrong to immovable property;

(f) for the recovery of movable property actually under distraint or attachment,

where the property is situate in Kenya, shall be instituted in the court within the local limits of whose jurisdiction the property is situate: Provided that a suit to obtain relief respecting, or compensation for wrong to, immovable property held by or on behalf of the defendant may, where the relief sought can be entirely obtained through his personal obedience, be instituted either in the court within the local limits of whose jurisdiction the property is situate, or in the court within the local limits of whose jurisdiction the defendant actually and voluntarily resides or carries on business, or personally works for gain.

14. The civil suit, being one concerning the destruction of **immovable property**, is subject to the aforementioned provision of law. The property as per the facts was situated in Githongo, Abothuguchi West Division in Imenti Central District. Further, it is averred by the Respondents that all parties, i.e the Applicants and the Respondents are resident in Githongo. This averment has not been controverted by the Applicants and it is further noted that the Applicants already submitted themselves to the jurisdiction of the Court at Githongo as they fully participated during the hearing of the Plaintiffs' case up to taking a date for the Defence case. For these reasons, this Court finds that the suit was properly instituted in Githongo. The mere fact that there is a pending criminal case in Meru is not good reason to order for a transfer more so when the immovable property was situated in Githongo and where all parties are resident in Githongo.

15. An issue was raised as to pecuniary jurisdiction. But even then, the said case seeks compensation to the tune of Ksh 2,356,958.40/= and mesne profits at Ksh 60,000/= per month and the Senior Resident Magistrate's Court has the requisite pecuniary jurisdiction under the Magistrate's Court Act No. 26 of 2015, the law has set out the pecuniary limits for each category of Court.

16. As this Court concludes on this issue, having found that the Court at Githongo has both geographical and pecuniary jurisdiction to entertain the matter before it, this Court must add that in totality, an order for transfer would not be in the best interests of promoting the overriding objective of expeditious and affordable resolution of disputes as well as safeguarding judicial resources as such an order would most likely result in having the matter be heard afresh. For the above reasons, this Court declines to grant the prayer for transfer of the case.

Stay of proceedings

17. A stay of the civil proceedings pending hearing and determination of the criminal matter, on the ground, as urged by the Applicants, that the civil suit stemmed from the criminal proceedings is unwarranted in view of Section 193A of the Criminal Procedure Code which provides as follows: -

193A. Notwithstanding the provisions of any other written law, the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings shall not be a ground for any stay, prohibition or delay of the criminal proceedings.

18. The jurisdiction of a court to adjudicate over a civil matter is separate and distinct from the court's jurisdiction over a criminal matter. For civil matters, the cause of action arises from a wrong committed by one to the other in the private sphere of law whereas for the criminal matter, the basis to press charges and initiate prosecution would arise from a breach of law already prescribed for by law.

19. The institution of either proceedings of criminal or civil nature is not a hindrance and/or a bar to the institution and progression of the other. A civil case can rightfully run concurrently with a criminal case and vice versa notwithstanding that they both relate to similar sets of facts. For one, the standard of proof is on a balance of probabilities whereas for the other, the standard of proof is beyond reasonable doubt. Furthermore, the finding of the Court in either does not exempt the Court confronted with the other matter from applying its own independent mind and analysis of facts and issues, in tandem with the respective rules of procedure. Consequently, the argument that the Applicants intend to use the findings of the Court in the criminal matter to support its Defence, is without merit.

20. This Court does not find any evidence of malice in the fact that the particulars of offence in the charge sheet describe the property damaged as being worth Ksh 1,500,000/= and yet the civil suit is seeking damages to the tune of Ksh 2,356,958 and thus supposedly inferring malice in the civil suit. The value of property is a relative matter which in the events of contestation will call for the valuation of property. It is up to the party contesting the value pleaded or ascribed to adduce evidence showing a contrary value. Furthermore, the drafters of the charge sheet are not the drafters of the Plaint in the civil suit. The value ascribed to the property in a criminal case of destruction of property is merely descriptive intended to describe the nature of the property in issue for the benefit of the Court in determining the nature of sentence and/or punishment to should the Court find the accused guilty. On the other hand, the civil case is concerned with compensation which ordinarily goes beyond the descriptive value of the property to include matters such as mesne profits and punitive damages for malicious damage.

21. In the case of **Alfred Lumiti Lusiba Vs Pethad Ranik Shantilal & 2 Others Civil Appeal No. 102 of 2012 (2016) eKLR** the Court was confronted with this same issue on whether there is any legal basis for staying a civil suit whose cause of action is based on facts similar

to particulars of offence in a criminal trial. The Appellants therein were challenging a decision by the lower Court to stay certain civil proceedings on the basis that there was a pending appeal challenging the conviction and sentence of the Respondents therein and I respectfully agree with Ngaah Jarius J. that: -

“...Section 193A of the Criminal Procedure Code contemplates the two processes running concurrently where facts which give rise to a cause of action are the same facts that constitute the particulars of an offence....

...The law is clear that the pendency of a civil suit is not a bar to criminal proceedings; it acknowledges the fact that the trial of the tortfeasor in a criminal prosecution need not be affected by the pending civil action against him. It is implied, therefore, that a civil suit cannot be stayed because of the prosecution of the tortfeasor for the obvious reason that the cause of action is neither rooted in the prosecution of the tortfeasor nor in his subsequent conviction....

...The conclusion that one can draw from Section 193A of the Criminal Procedure Code together with the decisions of the learned judges in aforementioned cases is that both civil and criminal jurisdictions can run parallel to each other and that neither can stand in the way of the other unless either of them is being employed to perpetuate ulterior motives or generally to abuse of the process of the court in whatever manner.

Orders

22. Accordingly, for the reasons set out above, the application by Notice of Motion dated 2nd November 2020 for the stay and transfer of **Githongo Senior Resident Magistrate’s Court Civil Suit NO. 20 of 2019** is dismissed

23. Costs to the Respondent, the Plaintiff in the suit before the trial court.

Order accordingly.

DATED AND DELIVERED THIS 11TH DAY OF FEBRUARY, 2021.

EDWARD M. MURIITHI

JUDGE

Appearances:

M/S Meenye & Kirima Advocates, the applicant.

M/S Kiautha Arithi & CO. Advocates for the Respondent