



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

CIVIL APPEAL NO.52 OF 2019

EUNICE MUTHONI NDERITU (Suing as the Administrator of the Estate of

MOSES WANGUI DECEASED).....APPELLANT/APPLICANT

VERSUS

DAVID NDERI KAMAU T/A LUKAKA SERVICE.....RESPONDENT

RULING

The matter for determination is the **Notice of Motion** Application dated **17th September 2019**, by the Appellant herein seeking for orders that;

a) There be a stay of proceedings in Ruiru CMCC No.59 of 2019 pending the hearing and determination of this Application and pending the hearing and determination of this Appeal.

b) That the Respondent his agents, servants and any persons claiming under them be restrained from interfering with the suit property being Land Reference No.4863 Plot No.12 pending the hearing and determination of this Appeal.

c) That this Court be pleased to transfer and or withdraw CMCC No.59 of 2019, from Ruiru Senior Principal Magistrates Court for hearing and determination.

The Application is premised on the grounds that the Appellant/ Applicant has filed an Appeal against the **Ruling** and **Orders** issued by the Honourable Magistrate **C.A Otieno-Omondi** on **27th August 2019**, in **CMCC No. 59 of 2019**. However the Court fixed the matter for Pre-trial on **24th September 2019**, and insisted with proceeding with directions unless there is a Stay of proceedings. Further that the Appellant has lost confidence in said Magistrate's Court and is apprehensive that it will not get justice as the Defendants/Respondents had knowledge of the outcome of the Ruling even before it was delivered. Further that the Respondent refused to serve the Defence and only served on the **10th of September 2019**, long after delivery of the Ruling and it is therefore in the interest of Justice that the suit property be preserved.

In her **Supporting Affidavit**, the Appellant/Applicant averred that she filed a suit for recovery of the suit land on **24th June 2019**, together with an application seeking orders of injunction. That the Court delivered its Ruling on **27th August 2019**, and being dissatisfied with the said Ruling, she seeks to appeal against it. She further averred that she has already applied for typed and certified copies of the proceedings and Ruling and the Court's determination on her Application which showed that the trial Magistrate entirely ignored her evidence and that she will not get justice. It was her further contention that the Defendant/Respondent had stopped construction during proceedings and only resumed a few days to the delivery of the Ruling and it is therefore clear that he had knowledge of the Ruling before the same was delivered and that the Court in its decision appears to have determined the entire case and condemned the Applicant unheard.

It was her contention that if the orders sought are not granted, she will suffer irreparable loss and damage as the suit property is next to where she has built her house and in light of the Ruling, the Respondent will continue to interfere with the suit property and that the Court has powers to order transfer and withdraw the proceedings at the **Ruiru Law Courts**.

The Application is opposed and the Defendant/Respondent **David Nderi Kamau**, swore a **Replying Affidavit** on the **7th October 2019**, and averred that the Applicant has not tendered a single document of ownership to warrant the grant of injunction. That the Applicant did not produce or demonstrate performance of a written agreement and that the payment receipts are liquidated sums that can be refunded should the Applicant succeed. He further averred that the Applicant failed to disclose material facts that construction had already been completed by the registered owner and that the Applicant has brought the suit against the Respondent who is not the owner of the suit property, having disposed the same by way of sale. It was his contention that he has been advised by his advocate that the Application for Stay should have been done in the Lower Court and therefore urged the Court to dismiss the Application.

The Appellant/Applicant filed a **Supplementary Affidavit** and averred that the agreement between the parties was verbal and all payments towards purchase of the land was completed by her on the **17th November 2006**, and having paid all the monies, she immediately took possession and constructed a house in **Plot No.11 and 12** and it would be unfair to take over her land as the Defendant and his agents have been doing construction on his land.

The Application was canvassed by way of written submissions to which the Court has now carefully read and considered. It is therefore this Court's opinion that the issues for determination are;

- 1. Whether this Court should transfer the matter from Ruiru Law Court to this Court.**
- 2. Whether there should be a stay of proceedings pending the hearing and determination of the Appeal.**
- 3. Whether this Court should grant an interlocutory order of injunction pending a determination of this appeal.**

1. Whether this Court should transfer the matter from Ruiru Law Court to this Court.

The guiding provision of law in deciding whether or not to transfer a suit is found in **Section 18** of the **Civil Procedure Act, Cap. 21** of the **Laws of Kenya** which provides as follows:

“(1) On the application of any of the parties and after notice to the parties and after hearing such of them as desire to be heard, or of its own motion without such notice, the High Court may at any stage—

a. transfer any suit, appeal or other proceeding pending before it for trial or disposal to any court subordinate to it and competent to try or dispose of the same; or

b. withdraw any suit or other proceeding pending in any court subordinate to it, and thereafter—

(i) try or dispose of the same; or

(ii) transfer the same for trial or disposal to any court subordinate to it and competent to try or dispose of the same; or

(iii) retransfer the same for trial or disposal to the court from which it was withdrawn.

(2) Where any suit or proceeding has been transferred or withdrawn as aforesaid, the court which thereafter tries such suit may, subject to any special directions in the case an order of transfer, either retry it or proceed from the point at which it was transferred or withdrawn.”

Further in the case of **Kithita Ngeana ...Vs... Mwaniki Kisume [2018] eKLR** the Court stated;

“Circumstances that would move a court to grant the order sought were considered in the David Kabungu Case (Supra) where Okello J stated that;

“Section 18 (1) (b) of the Civil Procedure Act gives the court the general power to transfer all suits and this power may be exercised at any stage of the proceedings even suo moto by the court without application by any party. The burden lies on the applicant to make out a strong case for the transfer. A mere balance of convenience in favour of the proceedings in another court is not sufficient ground though it is a relevant consideration. As a general rule, the court should not interfere unless the expense and difficulties of the trial would be so great as to lead to injustice. What the court has to consider is whether the applicant has made out a case to justify it in closing the doors of the court in which the suit is brought to the plaintiff and leaving him to seek his remedy in another jurisdiction... it is well established principle of law that the onus is upon the party applying for a case to be transferred from one court to another for due trial to make out a strong case to the satisfaction of the court that the application ought to be granted. There are also authorities that the principal matters to be taken into consideration are, balance of convenience, questions of expense, interest of justice and possibilities of undue hardship, and if the court is left in doubt as to whether under all the circumstances it is proper to order transfer, the application must be refused... Want of jurisdiction of the court from which the transfer is sought is no ground for ordering transfer because where the court from which transfer is sought has no jurisdiction to try the case, transfer would be refused...”

It is therefore clear from the above provisions of law on the circumstances under which the Court can order for transfer of cases from one court to another. In this instant, the Applicant is seeking the transfer of the suit from the Magistrate's Court to this Court which has a higher jurisdiction. However the reasons as to why the Applicant is seeking for the transfer is because she has lost faith in the Judicial Officer handling the matter. It is her contention that she would not get justice as it seems that the Judicial Officer has been compromised. In essence the Applicant is seeking recusal of the Judicial Officer from conducting the matter.

However, the Court has noted that apart from the Applicant assumptions based on the fact that the Respondent continued building just before the Ruling in the matter was delivered, there is no evidence of any misgivings by the Judicial Officer at this stage to warrant the Court make a finding. Further in seeking a recusal, it is this Court's opinion that that is a test on the impartiality and assessment of the Judicial Officer in which the opportunity should first be granted to the said Judicial Officer to make a finding before any other Court can pronounce itself on the same. Further even if the said Judicial Officer is to recuse herself from the matter, it is this Court's considered view that there is another

Judicial Officer in the station with the requisite jurisdiction to handle the matter and unless it can be proved otherwise, then this Court has no business transferring a matter to a Court of higher jurisdiction that may be called upon to preside over an Appeal based on recusal of a Judicial Officer.

This Court therefore finds and holds that the prayer seeking for transfer is not merited and the same is not merited.

2. Whether there should be a Stay of proceedings pending the hearing and determination of the Appeal

The powers of this Court to Stay proceedings pending Appeal and its jurisdiction is derived from both **Order 42 Rule 6** of the **Civil Procedure Rules** as well as the inherent jurisdiction reserved in section **3A** of the **Civil Procedure Act**. *In the case of **Global Tours & Travels Limited, Nairobi HC Winding Up Cause No.43 of 2000**, the Court laid down the considerations on whether or not to stay proceedings. The Court 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 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”

Further *Halsbury’s Law of England, 4th Edition. Vol. 37 page 330 and 332*, laid down the threshold for stay of proceedings;

“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 applicant 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.”

In light of the above, it is this Court’s holding that what it needs to establish is whether in exercising its discretion to order the Stay of proceedings, it will be in the interest of justice to grant the Stay of proceedings and whether there are exceptional circumstances which warrant the grant of the Stay of proceedings. In this instant case, the Applicant seeks a Stay of proceedings because in her mind, she feels that the Judicial Officer conducting the matter will not be fair and that she has appealed against the order of the said Presiding Judicial Officer. It is also alleged that if the Stay of proceedings is not granted, then the Applicant will suffer irreparably.

It is important to note that the Applicant is appealing against the order of the Court that denied her an order of temporary injunction. The question then that this Court will be asking is whether or not the failure to Stay the proceedings will cause any injustice to the Applicant herein.

It is this Court’s considered view that the order of temporary injunction whether or not granted at this stage would not affect the administration of justice as it does not go to the core of the case and therefore does not deal with the merits of the case. Even if the Stay is not granted, it is this Court’s holding that the Appeal will not be rendered nugatory as that is not the core of the suit in the subordinate court. What had been sought was only a temporary injunction. Therefore to grant the Stay of proceedings at this stage without any proper and or satisfactory reason, is unmerited and would only cause unnecessary backlog. As already held by this Court, the transfer of the suit to this Court is not merited as the subordinate Court has jurisdiction and therefore the Stay of proceedings at this stage would only delay the prosecution of the suit without any proper cause. Consequently, the Court finds that the Stay of proceedings is not merited. See the case of **Ezekiel Mule ...Vs...H. Young & Company (E.A) Limited [2019] eKLR**, where the Court held that:-

“Applying the test, the order in question is the one summoning AG to show cause why he should not be cited and punished for contempt of court. The AG had been summoned earlier to appear in court to state whether it was the state unwritten policy not to obey court orders. Arising from the default thereto, the order to show cause was made. I need not enter into the history of this matters which is quite disheartening. Except, to state that it will be most imprudent to stay these proceedings on account of a corollary order against the AG which is really in the realm of administration of justice rather than the merits of the case. After weighing the pros and cons of granting stay of proceedings, I find that this is not a proper case to exercise this court’s discretion in that direction. I reject the invitation to stay proceedings.”

3. Whether this Court should grant an interlocutory order of injunction pending the hearing and determination of this Appeal.

The Applicant has sought for a temporary injunction to be issued pending the hearing and determination of the Appeal. It is this Court’s finding and holding that the issue that must first be determined is whether or not the appeal will be rendered nugatory if the orders of temporary injunction pending Appeal are not granted. This Court finds that the Appeal that is set to be prosecuted borders on the dismissal of the Applicant’s Application to have a temporary injunction. It is the Applicant’s contention that the Respondent may continue to build on the suit property which is next to her house and therefore she will not get justice.

As the Applicant's Appeal seeks to have a temporary order of injunction, it is this Court's holding that if the injunction is not issued pending Appeal, then her Appeal would be rendered nugatory as what she is contesting is the refusal to grant the order of temporary injunction. Therefore, the Court finds and holds that the prayer seeking a temporary injunction pending Appeal is merited and consequently the same is allowed.

The upshot of the foregoing is that the Applicant's Application dated **17th September 2019**, is partially merited and the same is allowed in terms of prayer **No.(d) only** which sought for a temporary injunction pending Appeal of the **Notice of Motion** Application dated **17th September 2019**. However, the Court finds the **other prayers not merited** and they are dismissed entirely with costs being in the cause.

It is so ordered.

Dated, Signed and Delivered at Thika this 30th day of January 2020.

L. GACHERU

JUDGE

30/01/2020

In the presence of

No appearance for Appellant/Applicant though date taken in court

No appearance for Respondent

Lucy - Court Assistant.

L. GACHERU

JUDGE

30/01/2020