



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIVASHA

(CORAM: R. MWONGO, J)

HIGH COURT MISC. CIVIL APPLICATION NO. 4 OF 2020

HUSSEIN ALI DIMA.....1ST APPLICANT/PLAINTIFF

BALKISA QADIR.....2ND APPLICANT/PLAINTIFF

VERSUS

SOFIA MOHAMED SARAH.....RESPONDENT

RULING

Background

1. The applicants applied on 18th February, 2020 seeking an order to stay the proceedings in Naivasha **Civil Suit No 337 of 2014 Hussain Ali Dima & Balkisa Qadir v Sofia Mohamed Sarah** (Formerly Kajiado SRM Civil Case No 361 of 2009), pending hearing and determination of this application. Civil Suit 337 was at the time of this application due for hearing on 5th May, 2020.
2. The historical background of this matter is important to note because on 4th March 2019, the applicants had applied to this court vide Misc Civil Application No 119 of 2019, seeking that Civil Suit No 337, Naivasha be transferred to Kajiado. The main ground in Misc Application 119/2019 was that the substantive dispute involved trespass into **Plot No 664 Residential/Olekasasi Trading Centre**, the suit land, located in Kajiado. The original suit had been filed in Kajiado as Civil Case No 361/2009.
3. So that I would have the full picture and a proper perspective concerning the dispute and its chequered history, I called for the file in **Misc Application 119/2019** (which I had subsequently ordered transferred to Kajiado and noted that it had been re-numbered as **Kajiado Misc No 48 of 2019**).
4. From the file in Misc Applic No 119/2019, I noted that following a ruling by the subordinate court in Kajiado in Case No 361 Kajiado on 14/9/2010, an appeal was preferred in Machakos High Court in High Court Civil Appeal No 142 of 2010. Mutende,J, delivered a Ruling on 26th April, 2014, in which she traced the history of the proceedings, allowed the appeal and transferred the case to Naivasha Chief Magistrate's Court. That file was registered in Naivasha as Civil Suit No 337 of 2014.
5. The learned Judge (Mutende,J) noted that the land in dispute was also known as Plot No 88/Business - Ole Kasasi Trading Centre, but was the same land as Plot No 664; that the appellant Sophia Mohamed Sarah had alleged she had built a house on that land; that the cause of action in the plaint was wrongly pleaded as having arisen in Naivasha; that the issue of the mis-pleading and lack of jurisdiction had not been raised in the defence or at any stage of hearing and hence that parties were bound by their pleadings. Accordingly, the learned Judge allowed the appeal and transferred the case to Naivasha which had been pleaded as the locale where the cause of action had arisen. It was this transferred file that came to be known as Naivasha Civil Suit No 337. There is no indication that the decision of Mutende J was appealed from.
6. Meanwhile in Kajiado, HC Misc Applic 119 of 2019, the dispute had been registered as an Environment and Land Court matter Misc No 48 of 2019. In a ruling by the learned Ochieng, J, dated 29th January, 2020, the ELC Court declined to transfer Naivasha CMCC No 337 to Kajiado. In the ruling, reported as **Hussein Ali Dimat & another v Sophia Mohamed Sarah [2020] eKLR**, the learned Ochieng, J stated, inter alia:

“In the current scenario, I note Lady Justice Mutende in her judgment dated the 3rd April, 2014 in Machakos High Court Civil Appeal No. 142 of 2010 directed that the Kajiado SRMCC No. 361 of 2009 was to be transferred to Naivasha for hearing and

final determination. On keen perusal of the Plaint in the Kajiado SRMCC No. 361 of 2009 (now Naivasha CMCC No. 337 of 2014) the Plaintiffs therein clearly pleaded that the cause of action arose in Naivasha. It is trite law that parties are bound by their pleadings. I note in the authorities cited by the Applicant, they were all made in instances where a Court of Concurrent jurisdiction had not already made a decision to transfer a matter from one court to another, which is not the case herein. Further, Section 11 and 12 of the Civil Procedure Act are explicit on the jurisdiction of a Court. Insofar as the Applicants have made a strong case for the transfer of the matter from Naivasha to Kajiado, except for contending that their previous advocate had made a mistake, they have not explained to Court whether they have sought for review or appealed from the judgment in Machakos High Court Civil Appeal No. 142 of 2010. I opine that the said judgement still stands.”

7. Further, the learned Judge stated:

“I note the Applicants have relied on Article 159 (2) (d) of the Constitution to argue their case but I opine that the said Article is not a remedy for all procedural shortfalls especially in instances where there is already a judgement of the Court determining an issue in controversy as is the case herein. As a Court, I cannot sit as an appellate Court from a judgment of a Concurrent jurisdiction. I find that the Naivasha CMCC NO. 337 of 2014 should be heard and determined at Naivasha.”

8. Back to the application herein which seeks stay of the proceedings in CMCC No 337 of 2014, pending the hearing and determination of an intended appeal against the ruling of Ochieng, J. the Notice of Motion invokes section 1A, 1B, 3A of the Civil Procedure Act and Article 159 of the Constitution. The application and submissions re-hash the arguments of the parties already thrashed out before both Mutende, J and Ochieng, J. Essentially, the mistake in the original pleadings is invoked as the *raison d' être* for the mis-filing of the case in Naivasha.

9. I see no benefit to be achieved in discussing at length the parties' submissions. The kernel, and only real issue before me is whether or not to grant stay of the lower court proceedings.

10. I have carefully perused the papers filed, and have several concerns. First, I do not see any draft Memorandum of appeal or even a copy of notice of appeal filed in the Court of Appeal. Thus, there is no indication of the possible grounds of appeal nor of any indication of their merit or whether the appeal is arguable.

11. Secondly, the High Court in Machakos and the ELC Court in Kajiado both ordered the hearing to proceed in Naivasha in CMCC No 337 of 2014. I think the application for stay should have been filed either in the matter in Kajiado or in Machakos or in CMCC 337 in the first instance, and only if there was refusal by that court, would an application on appeal be filed in this court.

12. Further, **Order 42 Rule 6** of the **Civil Procedure Rules** which is the legal basis for grant of stay pending appeal was not invoked by the applicants. Under that provision, the Applicant is required to demonstrate that **substantial loss may result unless the order is made; and that the application has been made without unreasonable delay; and if the court is satisfied may order such security as it deems fit for the due performance of the decree (if any) has been given.**

13. **In this regard, reference is made to the Supreme Court's Ruling in Gatirau Peter Munya v Dickson Mwenda Kithinji [2019] eKLR in which the principles for grant of stay of execution were elaborated as follows:**

“(1) The appeal or intended appeal is arguable and not frivolous, and that;

(ii) Unless the order of stay sought is granted, the appeal or intended appeal, were it to eventually succeed, would be rendered nugatory;

(iii) these principles continue to hold sway not only in those courts but in this court as well...”

14. **The Supreme Court also stated in Malindi Law Society v LSK Nairobi Branch & 5 Ors [2018] eKLR that:**

“...a grant of stay of existing orders cannot be a matter of course. It rests upon genuine conditions of urgency, merit and dispatch – which in this case are missing”

15. **Finally, and very significantly, and I do not know whether the applicants have considered this: the application they have filed seeks to stay the proceedings in CMCC 337 of 2014. Those proceedings were ordered to proceed by two courts of concurrent jurisdiction; the High Court at Machakos and the Environment and Land Court at Kajiado. In effect, the application seeks to arrest the execution of the decision of those courts. This court has no substantive jurisdiction to make orders that tend to negate the orders of courts of concurrent jurisdiction, and it would be remiss of me to so attempt. I decline the proposition.**

16. Although the applicant argued that the appeal would be rendered nugatory if the application was not allowed, I do not see any demonstration of that fact. The subject matter of the suit is land and the question of trespass or ownership appears to be central therein. All that has been ordered is that the subordinate court in Naivasha hear the substantive suit. I do not consider that there is anything in or concerning such suit that could render the eventual outcome of an appeal nugatory, and nothing was so explained.

17. Ultimately, the substantive suit is a 2009 matter. It has had a circuitous journey, all due to an error by the parties. Justice demands that the suit be expedited to conclusion on the merits. I agree with the learned Judges, Mutende and Ochieng, that the hearing should proceed to conclusion expeditiously and the outcome thereof be subjected to appeal if necessary.

18. Accordingly, I am not persuaded by the applicant's grounds, and find no reason to grant stay of the lower court's proceedings. In the

result, I hereby dismiss the application with costs to the respondent.

Administrative directions

19. Due to the current inhibitions on movement nationally, and in keeping with social distancing requirements decreed by the state due to the Corona-virus pandemic, this Judgment has been rendered through Zoom/Teams video/tele-conference with the consent of the parties noted hereunder, who were also able to participate in the conference. Accordingly, a signed copy of this judgment shall be scanned and availed to the parties and relevant authorities as evidence of the delivery thereof, with the High Court seal duly affixed thereon by the Deputy Registrar/Executive Officer, Naivasha.

20. A printout of the parties' written consent to the delivery of this judgment shall be retained as part of the record of the Court.

21. Orders accordingly

Dated and Delivered via video-conference at Nairobi this 4th Day of June, 2020

RICHARD MWONGO

JUDGE

Delivered by video-conference in the presence of:

1. Mr Jaoko for the Applicant
2. Mr Omwenga for the Respondent
3. Court Clerk - Quinter Ogutu