



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI HIGH COURT
CIVIL CASE NO 278 OF 2015

KOINANGE INVESTMENTS & DEVELOPMENT CO. LTD.....PLAINTIFF

VERSUS

IAN KAHIU NGETHE

NICHOLAS NGETHE

EDDAH GACHUKIA &

RAPHAEL KAMAU NGETHE (being the personal representatives

of the Estate of ROBERT NELSON NGETHE [Deceased]).....DEFENDANTS

RULING

1. For the determination of the Court are three applications under two different suits; in the instant suit, application was made by the Plaintiff which application was brought under the provisions of Order 42 Rule 6 & Order 51 Rule 1 of the Civil Procedure Rules, as well as Sections 1A, 1B and 3A of the Civil Procedure Act. In the application dated 1st December 2015, the Applicant sought the following orders *inter alia*;

1. THAT there be a stay of proceedings in HCCC No 3164 of 1995 and/or in the alternative, there be a stay of execution of the judgment delivered by Honourable Justice Osiemo on 14th October 2002 which judgment is the subject matter of this suit, pending the hearing and determination of an intended appeal that the Plaintiff/Applicant intends to prefer in the Court of Appeal against the said judgment of Honourable Justice Osiemo delivered on 14th October 2002.

2. THAT costs of this application be in the course.

2. In HCCC No 3164 of 1995 are two (2) applications both dated 22nd February 2016. One application has been brought by the Defendant (the Plaintiff in HCCC No 278 of 2015) under Order 42 Rule 6 & Order 51 Rule 1 of the Civil Procedure Rules as well as Sections 1A, 1B and 3A of the Civil Procedure Act. The Defendant seeks the following prayer *inter alia*;

1. THAT there be an order for stay of proceedings in this suit and/or in the alternative, there be stay of execution of the judgment delivered by Honourable Justice Osiemo on 14th October 2002 regarding the subject matter in this suit, pending the hearing and determination of an intended appeal that the Defendant/Applicant intended to prefer in the Court of Appeal against the judgment of Honourable Justice Kariuki delivered on 6th November 2015 in HCCC No 278 of 2015 (Commercial & Admiralty Division) by which Honourable Justice Kariuki declined to declare the judgment by the Honourable Justice Osiemo enforceable.

2. THAT the costs of this application be in the course.

3. The second application was by the Plaintiff brought under the provisions of Section 3A of the Civil Procedure Act, as well as Order 50 Rule 1 of the Civil Procedure Rules. Therein, the Plaintiff sought for orders;

1. The deed file in respect of the property known as LR No 209/9099 be reconstructed and/or opened for purposes of registering the transfer executed by the Court in this matter;

2. The Court dispenses with the production of the original title document for LR No 209/9099 so as to effect the transfer.

3. Costs for this application be provided for.

4. On 23rd February 2016 at the commencement of the hearing of the applications, the Court gave the following directions;

1. THAT the two (2) application pending in HCCC No 3164 of 1995 shall be heard together in the same file;

2. The application dated 1st December 2015 shall be heard separately but at the same time and date with the applications in HCCC No 3164 of 1995.

5. The Court noted that there the two applications dated 1st December 2015 and 26th February 2016 were filed by the same party, seeking similar orders although instituted in two (2) different suits. The grounds relied upon in support of the application were similarly the same, in that Applicant seeks to prefer an appeal against the judgment of Honourable Justice Osiemo delivered on 14th October 2002, and therefore seek for order for stay of execution of the judgment pending the intended appeal in the Court of Appeal.

6. Further, it was averred that the Applicant had an arguable appeal in the Court of Appeal, and that they stood to suffer loss which cannot be remedied by any amount of damages awarded by the Court. Both applications were further supported by the affidavits of Mohamed Faisal Dubow sworn on 1st December 2015 and 15th

7. The applications were opposed through two grounds of opposition filed on 1st February 2016 and 2nd March 2016. It was contended that the applications were an abuse of the Court process, in that, no order for stay of execution of judgment can be made based on a decision in a different suit and that, the decision on HCCC No 278 of 2015 was incapable of being stayed and therefore orders for stay of execution could not issue.

8. Further, and with regards to the application made in HCCC No 278 of 2015, it was averred that no stay order could be issued with regards to HCCC No 3164 of 1995, and that such application should be made in that suit.

9. In the averments by the Applicants, they contended that the Court had, after delivering of the ruling

that essentially dismissed their suit with costs on 6th November 2015, given them a further fourteen (14) days within which to file the instant application. Further, the Applicants averred that the time in which they had been given to file the application, had lapsed on 20th November 2015. The instant application was made on 1st December 2015

10. I have perused the Court file. The Court granted leave to Applicants to file the instant application, in which they sought to stay the proceedings in HCCC No 3164 of 1995. The Court further extended the consent stay orders issued by Gikonyo, J on 23rd July 2015 for a further fourteen (14) days to allow the Applicants time to pursue their application. The orders issued were for stay of the proceedings in HCCC No 3164 of 1995 pending the hearing and determination of the instant application.

11. The Applicants did not file the application as directed by the Court, and instead filed the same on 1st December 2015. This was beyond the fourteen (14) day timeline that had been issued by the Court on 6th November 2015. In exercise of its discretion in awarding such orders, the Court had acted judiciously, and should therefore, it was upon the Applicants to exercise expediency in the filing of their application.

12. The Court exercised its inherent jurisdiction, to allow the parties subvert any injustices, real or otherwise, and thereby, it was incumbent upon the Applicants to proceed as directed by the Court. They, instead, chose to delay in the filing of the application, which by their own admission, should have been made on or before 20th November 2015.

13. No reasons were adduced as to why there was a delay in the filing of the application. As was enunciated by Mabeya, J in **Civil Case No 335 of 2011 A S Sheikh Transporters Ltd & Another v Barclays Bank of Kenya & 3 Others; (2013) eKLR**, stay of proceedings is on the discretion of the Court, and as with other discretions, the same should be exercised cautiously. He went on to reiterate as follows;

“It would seem that the order to stay proceedings is on the discretion of the court. Like all other discretions however, the same should not be exercised capriciously but judiciously. A close reading of Sub Rule 2 of Rule 6 would show that Ringera J was right in W.U Cause No. 43 of 2000 in the Matter of Global Tours and Travels Ltd (UR) when he held that the strictures that sufficient cause be shown and that no order of stay is to be granted unless the court is to be granted unless the court is satisfied that substantial loss will be suffered and the offer of security only apply to applications for stay of execution and not for stay of proceedings. In my view, the test for grant of stay of proceedings is whether it is in the interests of justice that a stay be granted and if it is granted, on what terms. In this regard, the court has to consider the application of Section 1A of the Civil Procedure Act as to expeditious disposition of a case, the hardship or prejudice to be suffered by the respective parties, prima facie merits of the intended appeal and whether the application has been made timeously.”

14. The Court, after delivery of the judgment on 6th November 2015, became *functus officio*. But in the exercise of its inherent and residual jurisdiction, allowed for the Applicants to, within fourteen (14) days of the delivery of the judgment, file a formal application seeking to stay the proceedings in HCCC No 3164 of 1995 pending an intended appeal, which order would have reinforced the consent that they had entered to before Gikonyo, J on 23rd July 2015.

15. Odunga, J in his ruling in **Petition No 210 of 2015 Waste and Environment Management Association of Kenya (WEMA) v Nairobi City County; [2015] eKLR** with regards to the issue of residual jurisdiction held *inter alia*;

“The course of justice must not be deflected and interfered with and those who strike at it, strike at the very foundation of our society. As was appreciated by the Court of Appeal in Kenya Commercial Bank Limited vs. Benjoh Amalgamated Limited & Another Civil Appeal No. 276 of 1997.

“To review a consent order on the ground that the original court file went missing can only

bring the law into disrepute and provide a field day for unscrupulous litigants who wish to obstruct the course of justice. If by simply arranging for the Court file to disappear you can put back the clock and postpone the day of reckoning, the Courts will be forced to enlist the services of armed guards to secure the safety of its files.”

Where the Court finds that it would in effect be abetting such actions, it is my view that the Court is entitled to take appropriate measures to right the wrong in order to send a strong message to persons who believe that by simply engineering the disappearance of the Court file they would have their way. That message must be clear that such actions would not pay. In **The Matter of The Estate of George M’mboroki Meru HCSC No. 357 of 2004, Ouko, J** (as he then was) expressed himself inter alia as follows:

“the court retains certain intrinsic authority in the absence of specific or alternative remedy, a residual source of power, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent abuse of its process, to do justice between the parties and to secure a fair trial between them.”

Similarly **Kimaru, J in Rev. Madara Evans OkangaDondo vs. Housing Finance Company of Kenya Nakuru HCCC No. 262 of 2005** held:

“The court will always invoke its inherent jurisdiction to prevent the abuse of the due process of the court. The jurisdiction of the court, which is comprised within the term “inherent”, is that which enables it to fulfil itself, properly and effectively, as a court of law. The overriding feature of the inherent jurisdiction of the court is that it is part of procedural law, both civil and criminal, and not part of the substantive law; it is exercisable by summary process, without plenary trial, it may be invoked not only in relation to the parties in pending proceedings, but in relation to anyone, whether a party or not, and in relation to matters not raised in litigation between the parties; it must be distinguished from the exercise of judicial discretion; it may be exercised even in circumstances governed by rules of the court. The inherent jurisdiction of the court enables the court to exercise control over process by regulating its proceedings, by preventing the abuse of the process and by compelling the observance of the process. In sum, it may be said that the inherent jurisdiction of the court is virile and viable doctrine and has been defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them.”

In **MeshallumWanguhu vs. KamauKania Civil Appeal No. 101 of 1984 1 KAR 780 [1987] KLR 51; [1986-1989] EA 593, Hancox, JA** (as he then was) emphasised that it is a residual jurisdiction, which should only be used, in special circumstances in order to put right that which would otherwise be a clear injustice. One of the instances in which the court exercises this residual power is in the fulfilment of its obligation to ensure that the orders it issues are not issued in vain. This was recognised by the Court of Appeal in **Nicholas Mahihu vs. Ndima Tea Factory Ltd & Another Civil Application No. Nai.101 of 2009** where it was held that the Court has the duty to ensure that its orders are at all times effective.”

16. The Applicants had, with undue disregard, blatantly and without just cause, ignored the directions issued by the Court, and disregarded the directions on filing of the instant application. No reason, as highlighted herein elsewhere, was adduced before the Court for the delay in filing the application. As reiterated in **A S Sheikh Transporters Ltd & Another v Barclays Bank of Kenya & 3 Others** (supra), the stay of proceedings is a discretionary power that may be exercised by the Court in circumstances that it deems fit.

17. The circumstances in the present application do not suffice or satisfy the Court to warrant such orders. In turn therefore, the application by the Applicants dated 1st December 2015 is dismissed with costs attendant awarded to the Respondents.

18. Similarly, in the application dated 22nd February 2016, the Applicant sought for similar orders, for stay of proceedings pending intended appeal against the judgment of Osiemo, J delivered on 14th October 2002. Under Section 6 of the Civil Procedure Act, it is provided that;

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 proceedings is pending in the same court or any other court having jurisdiction in Kenya to grant the relief claimed.

19. The test applicable in determining whether or not stay proceedings are pursuant to the provisions of Section 6 of the Civil Procedure Act, is whether the dispute in question are substantially and directly the same. The Court need only examine the pleadings to determine whether or not there is similarity in the issues. The Court has considered the pleadings in HCCC No 3164 of 1995, more so the application dated 22nd February 2015. The issues raised are similar, directly and substantially, in both that matter, and in the instant application.

20. In **Civil Appeal No 2908 of 2013 AspiJal & Another v Khushroo Rustom Dadyburjor**, the Indian Supreme Court held that;

“In the present case, the parties in all the three suits are one and the same and the court in which the first two suits have been instituted is competent to grant the relief claimed in the third suit. The only question which invites our adjudication is as to whether “the matter in issue is also directly and substantially in issue in previously instituted suits”. The key words in Section 10 are “the matter in issue is directly and substantially in issue in the previously instituted suit”. The test for applicability of Section 10 of the Code is whether on a final decision being reached in the previously instituted suit, such decision would operate as res-judicata in the subsequent suit. To put it differently one may ask, can the Plaintiff get the same relief in the subsequent suit, if the earlier suit has been dismissed. In our opinion, if the answer is in the affirmative, the subsequent suit is not fit to be stayed. However, we hasten to add then when the matter in controversy is the same, it is immaterial what further relief is claimed in the subsequent suit.”

21. These sentiments were held in the case of **Benja Properties Ltd v Savings & Loans Kenya Ltd (2003) eKLR** and **Thiba Mini Hydro Co. Ltd v Josephat Ndwiga (2013) eKLR**. It was contended that it was not the form in which the suit is framed that determines whether it is *sub-judice*, but rather, it is the substance of the suit, which has to be directly and substantially in issue in the previously instituted suit.

22. The reliefs notwithstanding, the issues raised in the application dated 22nd February 2016, are directly and substantially in issue in the instant application, and thus may be deemed as *sub-judice*, and of which the Court, pursuant to Section 6 of the Civil Procedure Act, shall not proceed to issue orders.

23. The upshot is that the application by the Applicants dated 22nd February 2016 is unmeritorious, and the same is dismissed with costs to the Respondents.

24. Turning to the application dated 22nd February 2016, the same was objected by the Respondents (HCCC No 3164 of 1995) through the Grounds of Objection dated 1st March 2016. It was contended that the order sought through the application were directed to the Chief Land Registrar, and that therefore, the said application could only be heard and determined by the Environmental and Land Court. It was averred that this Court, therefore, did not have the jurisdiction to hear and determine the application.

25. While this Court’s jurisdiction is founded under Article 165 of the Constitution, and that the Court has unlimited jurisdiction over all matters, it is, however, subject to limitations as enunciated under Article 165(5)(a) & (b) of the Constitution. Under Article 162(2)(b) there is established the Environmental & Land Court, which further exercises and draw its authority and mandate under Section 4, as read together with Section 13 of the Environmental & Land Court Act. Section 13 was amended

vide Act No 12 of 2012, and after which amendment, Section 13 now reads;

1. The court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.

2. In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes:

a. relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;

b. relating to compulsory acquisition of land;

c. relating to land administration and management;

d. relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and

e. any other dispute relating to environment and land.

3. Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of the Constitution.

4. In addition to the matters referred to in subsections (1) and (2), the Court shall exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the Court.

5. In exercise of its jurisdiction under this Act, the Court shall have power to make any order and grant any relief as the court deems fit and just, including: -

a. Interim or permanent preservation orders including injunctions;

b. Prerogative orders

c. Award of damages

d. Compensation

e. Specific performance

f. Restitution

g. Declaration or

h. Costs(Emphasis added).

26. In questioning the jurisdiction of the Court, parties ought, to take the holding in the case of **East African Railways Corp. v Anthony Sefu Dar-Es-Salaam HCCA No. 19 of 1971 [1973] EA 327**, into account. In that case it was held that ***“It is, a well-established principle that no statute shall be so construed as to oust or restrict the jurisdiction of the Superior Courts, in the absence of clear and unambiguous language to that effect.”*** In this instance, there is law and statute that restricts the jurisdiction of the High Court, to matters as dealt with under Articles 165(5)(a) & (b), as read together with Article 162(2)(b) and Sections 4 & 13 of the Environmental & Land Court Act.

27. In the foregoing therefore, the Court stands guided by the principles enunciated in the case of **Owners of the Motor Vessel "Lilian S" Caltex Oil (Kenya) Ltd (1989) KLR 1** as referred to in **Republic v Chairman, UasinGishu Land Disputes Tribunal & 2 Others, KaptichArapMorogo ex-parte (2014) eKLR** where it was stated:-

“Jurisdiction is everything. Without it, a court has no power to make one more step.” Any decision, however well-reasoned, made out of jurisdiction is a nullity and cannot be given effect.”

28. However, under Schedule six rule 22 of the constitution of Kenya, judicial proceedings pending before any court were to continue before same court on the enactment of the new constitution. The instant suit has been heard and determined by the High court .The matter is at enforcement of the decree stage. This court does not require the aid of the ELC court to enforce its decree. The court thus has jurisdiction to entertain the application.

29. The stay applications having failed, the court has no option but to grant application herein dated 22nd February 2016 as prayed with costs.

Written, dated and signed at Nairobi this 5th day of May 2016.

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C. KARIUKI

JUDGE

Dated, signed and delivered in court at Nairobi this 6th day of May, 2016.

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O. SEWE

JUDGE