



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC CASE NO 36 OF 2018

JANE AJWANG NYANGASI &

WENDY AKINYI NYADIDO (*Suing as the legal representatives*

of the Estate of EDWARD NYADIMO NGINJA)..... **PLAINTIFF/RESPONDENT**

VERSUS

WYCLIFFE OTIENO.....**1ST DEFENDANT/APPLICANT**

DANIEL MUNYAMBU MUTUI.....**2ND DEFENDANT/APPLICANT**

RULING

The matter for determination is the **Notice of Motion Application** dated **14th January 2020**, by the Defendants/ Applicants seeking for orders that;

- 1. That this Honourable Court be pleased to set aside and/ or stay orders issued on 27th November, 2019 allowing this suit to proceed *ex parte* in the absence of the Defendants/ Applicants.**
- 2. That the Defendant/ Applicants be granted leave to amend their statement of Defence dated 25th July 2018 to include a Counter Claim as per the annexed draft of Amended Statement of Defence and Counter Claim.**
- 3. That the Amended Statement of Defence and Counter Claim be deemed proper for filing and service to the Plaintiff's Advocate.**
- 4. That the Plaintiff/ Respondent be granted leave to amend the Plaint and/or file and serve a Defence to the Defendants' Counter Claim within 14 days of service of the Amended Statement of defence and Counter claim.**
- 5. That this suit be set down for hearing *de novo* on priority basis or in the alternative.**
- 6. That there be stay of this suit and/or further proceedings pending the hearing and determination of the Civil Case Number 891 of 2015 in the Chief Magistrates Court in Thika involving the same parties and subject matter.**
- 7. That the costs of this Application be provided for.**
- 8. That any other and/or further orders of this Honourable Court do issue as it may deem necessary and expedient in the interest of justice.**

The Application is premised on the grounds that the suit came up for hearing on **27th November 2019**, when the Counsel for the Defendants/ Applicants sought an adjournment of the same but that the Court declined to grant the said adjournment and ordered for the suit to proceed for hearing in the absence of the Defendants/ Applicants. That the Applicants are highly prejudiced as the Court is likely to proceed and render a Judgment without considering their evidence.

It was contended that it would be in the interest of Justice that the Court set aside and/or stay the Orders of **27th November, 2019**, and allow the Defendants/ Applicants to adduce their **viva voce** evidence in their Defence. That non-attendance of the Applicants in Court on **27th**

November 2019, was due to circumstances beyond their control and they should not be unfairly punished. Further that there is evidence that a similar matter is pending in the Chief Magistrates Court **Civil Case No. 891 of 2015** at **Thika**, and it would be in the interest of justice that the current suit is stayed to allow the hearing and determination of the earlier suit. That the Plaintiff/ Respondent shall not suffer any prejudice if the Court grants the orders sought and that the Defendants/Applicants have a **good defence** and **Counter Claim** and should be allowed to prosecute the same.

The 1st Defendant/Applicant **Wycliffe Otieno** in his supporting Affidavit averred that he works with the **United Nations Children's Fund** and currently domiciled in **Pretoria, South Africa**. That his work engagement involves a lot of travelling to different parts of the world and that he travelled to Kenya on **4th December 2019**, for Christmas Holidays having exited the Country previously on **7th August 2019**. That upon his arrival in Kenya, he consulted his Advocate and he got to know that the matter had come up for hearing on **27th November, 2019**.

That on **27th November 2019**, he was in his office on duty station in Pretoria, South Africa and that time of the year is a critical one for the **United Nations** Systems and was therefore not reachable on his phone as he was always in meetings and at times his phone would be off. He averred that his Advocate had been trying to reach him on **+27825613972**, but he could get him. He contended that his non-attendance of the hearing on **27th November 2019**, was not intentional and that it was out of his control. That his Advocate had filed his statement of Defence, Witness statement and List of Documents and he has a good defence and the Court should be kind enough to give him a chance. Further that having perused the pleadings, he realized that it would be necessary in the interest of justice for him to be allowed to amend his **Defence** and put in a **Counter claim** and that his Counter claim is informed by a valuation of the suit property carried out by **Afriland Valuers Limited** showing the current value of the suit property as **Kshs. 4,200,000/=**. He contended that there is a similar case between him and the Plaintiff in the **Chief Magistrates Court at Thika** and that the Plaintiff cannot file two similar case in two different Courts over the same subject matter.

The Application is opposed and the Plaintiff/Respondent filed grounds of opposition dated **2nd June 2020**, and urged the Court to dismiss the Application on grounds that the Applicants have failed to establish any justifiable reason for re-opening of the case. That it is in the interest of Justice and overriding objectives of the Court that the legal proceedings are conducted efficiently hence the Court should not afford recourse towards the negligent conduct of litigation by the Defendant/ Applicant. Further that the hearing of the suit has been closed, hence there has been unreasonable delay in bringing the Application for Amendment and that the intended Amendment belatedly introduces a different Defence and/ or claim for the first time at the end of the trial and is therefore extremely prejudicial to the Plaintiff/ Respondent.

It was further contended that the **stay of proceedings** as sought in the Application is untenable as it is tantamount to an **appeal** against the Order of the Court issued on **9th April 2018** dismissing the Defendant's Preliminary Objection dated **19th February 2018**, with costs which was premised on similar grounds. Further that the Application is otherwise an afterthought and amounts to an abuse of the process of this Court.

The parties were directed to file written submissions. While the Defendants/ Applicant filed their written submissions, the Plaintiff/ Respondent did not file their written submissions, The Court has now carefully read and considered the pleadings, the Affidavits and the written submissions and finds that the issues for determination are ;

1. Whether the Instant Suit is subjudice

2. Whether the Defendants/ Applicants are entitled to the orders Sought

1. Whether the Instant Suit is subjudice

It is the Defendants/Applicants contention that the suit is subjudice since there is a similar suit pending between the parties being **CMCC No. 891 of 2015**. However, the Plaintiff/ Respondents have averred in the grounds of objection that the Defendants/ Applicants' Application based on the said grounds had already been dismissed by the Court. The Court however notes that the **Preliminary Objection** that raised the issue of the suit being sub judice was never determined on merit. Further that the same had been raised as a Preliminary Objection which could not be sustained.

It is not in doubt that the issue of **sub judice** goes to the jurisdiction of the Court as a Court cannot proceed with the trial of any suit which is substantially in issue in another Court or similar matter before another Court of competent jurisdiction. See **Section 6** of the **Civil Procedure Act** which provides:

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

In the case of **Republic ...Vs... Registrar of Societies - Kenya & 2 Others Ex-Parte Moses Kirima & 2 Others [2017] eKLR** the court held that:

"...Therefore for the principle to apply certain conditions precedent must be shown to exist: First, the matter in issue in the subsequent suit must also be directly and substantially in issue in the previously instituted suit; proceedings must be between the same parties, or between parties under whom they or any of them claim, litigating under the same title; and such suit or proceeding must pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed..."

The rationale for this principle was restated in Kampala High Court Civil Suit No. 450 Of 1993 - Nyanza Garage vs. Attorney General in which the Court held that:

“In the interest of parties and the system of administration of justice, multiplicity of suits between the same parties and over the same subject matter is to be avoided. It is in the interest of the parties because the parties are kept at a minimum both in terms of time and money spent on a matter that could be resolved in one suit. Secondly, a multiplicity of suits clogs the wheels of justice, holding up resources that would be available to fresh matters, and creating and or adding to the backlog of cases courts have to deal with. Parties would be well advised to avoid a multiplicity of suits.”

Further In the case of Barclays Bank Of Kenya Ltd ...Vs... Elizabeth Agidza & 2 Others [2012]eKLR the court held that:

“...if the controversy in the subsequent suit can be conveniently and properly adjudicated upon in the previous suit, by virtue of the enactment of Sections 1A and 1B of the Civil Procedure Act, Section 6 will still apply. This is so because the overriding objective of the Civil Procedure Act is for expeditious and proportionate resolution of civil disputes between parties...”

The Court has carefully perused the pleadings in **CMCC 891 of 2015** and notes that in the said suit, the Plaintiff/ Respondent are seeking for a permanent injunction as against the Defendants/ Applicants herein and that these are the same orders that have been sought in the Plaintiff in the instant suit dated **1st February 2018**. Further the Court notes that the bone of contention in both suits is the suit property herein being **Ruiru/Kiu Block 15/105**, and whether or not spousal consent was obtained before the suit property was sold to the Defendants/ Applicants.

It is the Court's considered view that the main issue in both suit are similar as they both involve the same suit property and the question that both Courts are called to determine is whether the sale agreement was valid for lack of spousal consent and as both suit involve the same parties, the Court finds and holds that the issues are similar. The Court further notes that one of the suit has been filed in the subordinate Court and one in this Court which is a Superior Court. From the valuation report produced in Court as evidence, It is not in doubt that the value of the suit property is roughly **Kshs. 4,000,000/=**. Therefore that the Subordinate Court is well vested with the requisite pecuniary jurisdiction to hear and determine the matter. For the said reasons, the said Court is competent and given that the said suit was filed first, it follows that the instant suit is **sub judice** and must therefore be stayed as per the provisions of Section 6 of the **Civil Procedure Act**.

2. Whether the Defendants/ Applicants are entitled to the orders Sought

The Defendants/ Applicants have sought for various orders amongst them the stay of this suit and /or further proceedings until the hearing and determination of **Civil Case No. 891 of 2015**. The Court has already held and found that the instant suit is **sub judice** and therefore it is the Court's considered view that the same is merited and the Defendants/ Applicants are entitled to the same.

The Defendants/ Applicants have further sought for setting aside of orders issued on **27th November 2019**, and for leave to be granted to allow them file an Amended Statement of Defence and Counter Claim. The Court acknowledges that staying of a suit does not bar the Court from hearing and determining interlocutory Applications. see the case of **B.M. ...Vs...S.M.M[2012]eKLR** where the Court held that ;

“Further, and in deference to the contention by counsel for the Respondent, even if the Children's Court Case No. 652 of 2012 were held to be barred by reason of sub-judice principle, it is trite law that an order for stay of a suit on the sub-judice principle is no bar to the hearing and determination of interlocutory applications in the stayed suit.”

However, in this instant case the Court finds that the said Application goes to the merit of the case. It will be an exercise in futility for this Court to determine whether it should set aside the proceedings of **27th November, 2019**, and allow an Amendment of the Defence while there is a similar matter that is being adjudicated upon by a Court of competent jurisdiction. The Court finds that at the risk of finding itself granting orders that may be conflicting, it is prudent that at this juncture the Court does not deal with the said issues. The Court therefore finds and holds that the said prayers cannot be granted at this stage.

The upshot of the foregoing is that the Court finds and holds that this suit is **Sub judice** and **stays the proceedings** by allowing prayer No. 7 of the Notice of Motion Application dated **14th January 2020**.

For avoidance of doubt the Court makes the following Order:-

1. That there be stay of this suit and/or further proceedings pending the hearing and determination of the Civil Case Number 891 of 2015 in the Chief Magistrates Court in Thika involving the same parties and subject matter.

2. The Stay involves the determination of the prayers sought by the Defendants/ Applicants in their Application dated 14th January 2020.

It is so ordered.

Dated, signed and Delivered at Thika this 19th day of November 2020

L. GACHERU

JUDGE

19/11/2020

Court Assistant - Lucy

ORDER

In view of the declaration of measures restricting court operations due to the **COVID-19** Pandemic, and in light of the directions issued by His Lordship, the Chief Justice on **15th March 2020**, this **Ruling** has been delivered to the parties online with their consents. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

With Consent of and virtual appearance via video conference – Microsoft Teams Platform

No appearance for the Plaintiff/Respondent

No appearance for the 1st Defendant/Applicant

No appearance for the 2nd Defendant/Applicant

L. GACHERU

JUDGE

19/11/2020