



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 924 OF 2012

NICHOLAS KUNDU WANYAMA.....PLAINTIFF

VERSUS

BENSON KOSGEI KIBET.....1ST DEFENDANT

JANE NYONGESA.....2ND DEFENDANT

RULING

[NOTICE OF MOTION DATED 28TH FEBRUARY, 2020 BY 2ND DEFENDANT]

1. The 2nd Defendant vide Motion dated 28th February, 2020 seeks for stay of these proceedings pending the hearing and determination of Eldoret Civil Appeal No. 140 of 2007, between **Stephen Nyongesa Karibu** and **Nicholas Kundu** and costs. The application is predicated on the five grounds on its face, and supported by the affidavit sworn by **Jane Nyongesa**, the 2nd Defendant, on the 28th February, 2020. It is the 2nd Defendant's case that the issues in the said appeal are substantially in issue herein, and to avoid a situation where two courts are likely to come to different decisions over the same subject matter, then this application should be allowed. That the appeal emanated from **Eldoret CMCC No. 1031 of 1998** between the Plaintiff herein, and her late husband over ownership of the suit land. That her late husband filed the appeal but passed on before it could be decided. That the 2nd Defendant is the legal representative of the estate of the Appellant and has obtained Grant of Letters of Administration in **Eldoret High Court Succession Cause No. 306 of 2012** issued on 23rd January, 2013.

2. The application is opposed by the Plaintiff through his replying affidavit sworn on the 13th March, 2020. The Plaintiff's case is that the appeal filed by Stephen Nyongesa who passed on the 5th July, 2008 abated on the 5th July, 2009. That the 2nd Defendant while aware of the appeal, and before applying for letters of administration to the estate of the deceased, transferred the suit land to the 1st Defendant on 30th May, 2012. That the 2nd Defendant has approached the Court with unclean hands and the application is aimed at delaying justice.

3. The 1st Defendant's learned Counsel filed their undated submissions on 3rd June, 2020 while the learned Counsel for the 2nd Defendant filed theirs dated 18th June, 2020 erroneously headed "**PLAINTIFF'S/APPLICANT'S SUBMISSION...**" The learned Counsel for the Plaintiff filed theirs dated 25th June, 2020, and the 2nd Defendant's Counsel filed further submissions dated the 28th June, 2020.

A. The 1st Defendant in his submissions indicated that they are not opposed to the 2nd Defendant's application as the issues in the pending appeal are substantially the same as in the suit. The learned Counsel cited the decisions in **Hangzhou Agrochemical Industries Ltd Vs Panda Flowers Ltd [2012] eKLR**, **Ga Life Assurance Ltd Vs St. Elizabeth Academy Karen Ltd [2019] eKLR**, **Attorney General of the Republic of Uganda Vs East African Law Society [2013] eKLR** and Nigeria Court of Appeal case of **Mobil Producing Nigeria Unlimited Vs His Royal Highness Oba Yinusa A. A. C. A./L/255/05**.

B. The Learned Counsel for the 2nd Defendant submitted that the 2nd Defendant did not know of the existence of the lower court suit, and appeal between her late husband and the plaintiff herein, until after this suit was filed. That she tried to trace the appeal's file without success, and applied for a skeleton file to be reconstructed to enable the appeal to be heard. That unless their application is granted, this court may have two contradicting decisions that may embarrass the court. The learned Counsel referred to the Court of Appeal case of **Butts Vs Rent Restriction Tribunal [1982] KLR 417**, and **Section 6 of the Civil Procedure Act**.

C. The learned Counsel for the Plaintiff submitted that the 2nd Defendant has not discharged her evidential duty for granting of her application. That upon the death of Stephen Nyongesa, the Appellant in the appeal on the 5th July 2008, the suit abated on 5th July, 2009 after one year, under **Order 24 Rule 3 of the Civil Procedure Rules**. The learned Counsel cited the decision in the case of **Babubhai M. Shah Vs M & M Science Ltd [2015] eKLR**, **Rebecca Mijede Mungole & Another Vs Kenya Power & Lighting Company Ltd & 2 Others [2017] eKLR**, **John Mutai Mwangi & 26 Others Vs Mwenja Nguni & 4 Others, Civil Application No. 126 of 2014**, **Charles Wanjohi Wathuku Vs Githinji Nguni & Another, Civil Application No. 9 of 2016**, **Macfoy Vs United Africa Co. Ltd [1967] 3 A11 ER** at page 1172 which was acknowledged, and adopted in **Virginia Mwari Thurairira Vs Purity Nkirote**

Thuranira [2017] eKLR, Samuel Kiiru Gitau Vs John Kamau Gitau Hccc No. 1249 of 1998, KLR and Owners of Motor Vessel "Lilian S" Vs Caltex Oil (Kenya) Ltd [1989] eKLR. It is the learned Counsel's submissions that abatement of the appeal upon one year lapsing from the date of death of the Appellant marked the end of the appeal as no advantage was taken to substitute him as per the proviso. That the 2nd Defendant has all along known of the facts in the appeal, and this case cannot be halted to await the outcome of an appeal that does not exist, as no evidence has been tendered to show the appeal has been revived after abatement. That the Court is with jurisdiction to hear and determine this suit, and the application should be dismissed with costs.

D. the Learned Counsel for 2nd Defendant in their further submissions stated that **Order 24 Rule 3 of the Civil Procedure Rules** relates to original suits, and not appeals, and therefore do not apply in this matter. That the decision in Babubhai M. Shah Vs M & M Science Ltd (supra) had been pursuant to an application for mandatory injunction under **Order 50 Rule 1, Order 40 Rule 2(i) of Civil Procedure Rules**, and **Sections 1A, 1B, and 3A of Civil Procedure Act**, while the current application is for stay of proceedings order under **Order 47 Rule 6 of Civil Procedure Rules, Section 1A, 1B, 3A, 6, 16, 17 and 18 of Civil Procedure Act**. That further, that decision being from a court of concurrent jurisdiction is not binding to this court. That they had attached an application dated 11th November, 2013 for the revival of the appeal and substitution through their list of documents filed on 25th February, 2014. That the Court should peruse the entire record and see a further list of documents dated the 26th February, 2016, and see the steps the 2nd Defendant had taken to revive the appeal, and to be substituted for the deceased appellant. That as the lower Court in Eldoret CMCC No. 1031 of 1998, Nicholas Kundu Wanyama Vs Stephen Nyongesa Karibu concluded the dispute on merit then this Court has to allow their application.

4. The following are the issues for the Court's determinations;

- (a) *Whether Eldoret HCCA No. 140 of 2007, Stephen Nyongesa Karibu Vs Nicholas Wanyama is pending or abated; or*
- (b) *Whether these proceedings are sub-judice Eldoret HCCA No. 140 of 2007.*
- (c) *Whether stay order should issue.*
- (d) *Who pays the costs of this application?*

5. The Court has carefully considered the grounds on the application, the affidavit evidence filed, the written submissions by the three learned Counsel, the superior courts' decisions cited thereon, and come to the following determinations;

(a) That grounds 2 and 3 of the application, and paragraphs 4 and 5 of the supporting affidavit, leaves no doubt that the 2nd Defendant's basis of seeking stay of these proceedings is to await the determination of Eldoret HCCA No. 140 of 2007 which emanated from the decision made in Eldoret CMCC No. 1031 of 1998 in favour of the Plaintiff herein, who was also the Plaintiff thereon, against Stephen Nyongesa Karibu, the late husband to the 2nd Defendant herein. That for there to be reasonable basis to seek stay of an active court proceedings so as to await the decision of another suit or appeal, such other matter must be active or pending. Otherwise, it would be defeatist and unreasonable to seek to stay an active court matter while the matter being awaited to be decided is already finalized in one way or another as per the law.

(b) That the Plaintiff's objection or opposition to the application is that Eldoret HCCA No. 140 of 2007 having abated on or about 5th July 2009, which was after one year lapsed from 5th July, 2008 when the Appellant died without any substitution or the suit being revived to-date, then there are no basis of staying these proceedings. That the learned Counsel for the 2nd Defendant attempted to adduce evidence through written submissions, including referring the court to an application dated 11th November, 2013 made in the appeal, and attached to the 2nd Defendant list of documents herein, that ought to have been deponed to and attached to the supporting affidavit for it to be admissible in evidence, and for consideration by the court. That the 2nd defendant should have gone further, and disclosed the status of their application to revive the appeal, and the stage the appeal was if at all it was pending. That without such evidence, the deposition by the Plaintiff that the appeal abated on the 5th July, 2009 remains unchallenged or rebutted. That the appeal having abated pursuant to **Order 24 rule 3 of Civil Procedure Rules** as submitted by the learned Counsel for the Plaintiff, then there is no pending suit that may be the basis of staying the proceedings herein.

(c) That the contention by the 2nd Defendant's learned Counsel that **Order 24** that deals with abatement does not apply in appeals does not hold water. That in Kent-Knit (K) Ltd Vs Ali Bakari [2008] eKLR, the Court had the following to say about **Order 23 of Civil Procedure Rules [which is today Order 24 of the Civil Procedure Rules, 2010]**;

"As for the provision of Order 23 Rule 8(2)...it is true they provide for a suit to be revived by a Plaintiff or his legal representatives. However, an appellant is the same as a Plaintiff otherwise, the provision of the whole of that order would not apply to appeals, and that would mean that appeals would not abate if one party passes away..."

That further, the Court of Appeal in George Mbiti Kiebia & Another Vs Isaya Theuri M'Lintari & Another [2014] eKLR, at paragraph one of its judgment acknowledged that an appeal do abate when they expressed themselves thus; *"...The 1st appellant is deceased and his appeal has abated..."*

That the provision of **Order 24 of the Civil Procedure Rules** has variously been taken by the Courts not to be a technicality that can be cured or accommodated under **Article 159 of the Constitution**, and helps the Courts to dispense justice in a timely, just effective and cost-effective manner as dictated by **Sections 1A and 1B of the Civil Procedure Act**.

(d) That as the **Eldoret HCCA No. 140 of 2007** has been found to have abated, the only suit that has dealt with the subject matter herein on merit is **Eldoret CMCC No. 1031 of 1998** which was decided on the 17th July, 2006 in favour of the Plaintiff in that case, who is also the Plaintiff herein. That suit was disclosed in the Plaintiff's pleadings, and as the registration of the suit land has since changed hands, the issue of res-judicata do not arise as the 1st Defendant, who is currently registered with the land was not a party in the previous suit.

(e) That having come to the finding that the 2nd Defendant has failed to establish reasonable basis for staying these proceedings, then she should pay the Plaintiff's costs in the application.

6. That the foregoing shows that the 2nd Defendant's Motion dated 28th February, 2020 has no merit, and is dismissed with costs.

Orders accordingly.

Delivered virtually and dated at Eldoret this 18th day of November, 2020.

S. M. KIBUNJA

JUDGE

In the presence of:

Plaintiff: Absent.

Defendants: Absent.

Counsel: Mr. Kibii for 1st Defendant.

Mr. Okango for Kiptoo for Plaintiff.

Court Assistant: Christine

and the Ruling is to be transmitted digitally by the Deputy Registrar to the Counsel on record through their e-mail addresses.