

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 814 OF 2017

MUSA ONSANDO OMWARE.....PLAINTIFF

VERSUS

YUSSUF GITHINJI SALEH.....1ST DEFENDANT

JOSEHP KAMAU MWANGI.....2ND DEFENDANT

FRANCIS RUHIU MACHARIA

T/A CORO BAR & RESTAURANT.....3RD DEFENDANT

RULING

What is before Court for determination is the Notice of Motion dated the 16th July, 2018 brought pursuant to section 1A, 1B, 3A and 6 of the Civil Procedure Act, Order 51 rule 1 and Order 42 rule 6 of the Civil Procedure Rules and all the other enabling provisions of the law. In the aforementioned application, the Applicants seek for orders of staying ELC 814 of 2017 pending the hearing and determination of the Appeal.

The application is premised on the grounds that the Applicants filed the Nairobi HCCC No. 6323 of 1991 which was dismissed for want of prosecution in June, 2016. The Respondent herein and the Plaintiff in ELC 814 of 2017 has filed an originating summons seeking for orders of adverse possession which had been consolidated with the dismissed suit that was seeking orders of eviction. The Applicant intends to Appeal against the decision of this Court. Further, if proceedings in ELC No. 814 of 2017 are not stayed, then the Respondents herein will proceed with execution of the outcome of the suit therein to the detriment of the Applicants who will suffer irreparably and the intended Appeal will be rendered nugatory. There has been no delay in filing this application and in the intended Appeal had merits. The Respondent will suffer no prejudice if the application is allowed.

The application is supported by the affidavit of JOSEPH KAMAU MWANGI who is the 2nd Defendant herein where he avers that they have filed a Notice of Appeal against the dismissal of their suit without being given a chance of being heard on the grounds that the said suit is res judicata. He confirms that they have applied for certified copies of the proceedings and it is only fair that the instant suit be stayed pending the determination of the Appeal. He insists that if the Respondent's suit proceeds, then their Appeal shall be rendered nugatory since he will be granted the orders he is seeking without the court ventilating on whether his occupation was uninterrupted.

The application is opposed by the Plaintiff/ Respondent MUSA ONSANDO OMARE who filed a replying affidavit where he deposes that the application is an abuse of the process of the court and lacks merit on the basis that the court having conclusively determined this matter and issued its ruling became functus officio. He confirms that the Applicant has filed a Notice of Appeal dated the 5th July, 2018 which is fatally defective and has slim chances of success. He avers that once the High Court made its ruling on matters before it, it is rendered functus officio and the Applicant cannot purport to request the court to stay its own ruling as it amounts to the Court revisiting its own ruling. He contends that the Applicants should have filed an application seeking a stay of ELC 814 of 2017 in the Court where their Notice of Appeal was lodged. He insists the Applicants have not demonstrated to the Court the prejudice to be suffered in the event the Appeal succeeds and the Originating Summons herein proceeds to full hearing with orders sought therein being granted. He reiterates that the Applicant's Notice of Appeal dated the 5th July, 2018 is incurably defective for non compliance with the relevant provisions of the Court of Appeal Rules for reason it was served upon his advocates after the expiry of a period of 7 days. He reiterates that the Applicant has not filed a Record of Appeal and the Notice of Appeal which he is seeking to rely on, to seek the stay orders has lapsed since it's been over three months from the date on which it was lodged and no further documents have been produced. He reaffirms that there is no document in the file or any arguments advanced to demonstrate there is an arguable appeal with high chances of success.

The Applicant filed his submission but the Respondent did not do so.

Analysis and Determination

Upon consideration of the materials presented in respect of the Notice of Motion dated the 16th July, 2018, the only issue for determination is whether ELC Case No. 814 of 2017 should be stayed pending the hearing and determination of the Appeal.

In the ELC 814 of 2017 the Plaintiff is seeking orders of adverse possession against the Defendants. In the said suit I note the Defendants have filed their response. In the Nairobi HCCC No. 6323 of 1991 that was dismissed for want of prosecution, the Plaintiffs therein who are the Respondents in ELC 814 of 2017 were seeking for orders of eviction, general damages and permanent injunction restraining the Defendant (Plaintiff herein) from trespassing on the land parcel number LR . 13977 NGONG TOWN. After the suit was dismissed for want of prosecution, the Defendants herein filed a fresh suit Kajiado ELC No. 638 of 2017 seeking orders of eviction and general damages against the Plaintiff herein over land parcel number LR – 13977 NGONG TOWN. This Court held that the second suit ELC 638 of 2017 was res judicata which ruling has been appealed from by the Defendants' herein.

The Defendants now seek to stay the hearing and determination of the Originating Summons until the Appeal is determined. From the materials presented the Applicant has not demonstrated the prejudice he will suffer if the matter proceeds to full hearing. I opine that the Defendants in the Originating Summons should proceed and defend it and in the event they are dissatisfied with this Court's decision, they will still have a recourse to Appeal. I am not convinced that the Defendants will be prejudiced if the Originating Summons was set down for hearing as the prayers they sought in their dismissed suit are the same averments they have included in their response to the Originating Summons.

It is against the foregoing that I find the instant application unmerited and will dismiss it with costs.

Dated signed and delivered in open court at Kajiado this 26th February, 2019

CHRISTINE OCHIENG

JUDGE