



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC CASE NO. 743 OF 2015

(FORMERLY HCCC NO. 199 OF 2011)

PRISKA ONYANGO OJUANG'1ST PLAINTIFF

JANE MILDRED OJUANG'2ND PLAINTIFF

VERSUS

HENRY OJWANG NYABENDE.....DEFENDANT

RULING

1. Henry Ojuang Nyabende, the Defendant, seeks through the motion dated 18th September 2018, for an order of stay of further proceedings in the court flowing from the orders made on the 21st February 2018, pending the hearing and determination of the Defendant's intended appeal. The application sets out eight (8) grounds marked (i) to (viii) on its face and is supported by the affidavit of the Defendant sworn on the 18th September 2018.

2. The application is opposed by the Plaintiff through the six (6) grounds of opposition dated the 24th September 2018.

3. The application came up for hearing on the 23rd January 2019 when Mr. Ragot and Orengo, Learned Counsel for the Defendant and Plaintiffs respectively, made their oral submissions.

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

a. Whether the Defendant has made a reasonable case for stay of proceedings order to issue.

b. Who pays the costs of this application.

5. The Court has carefully considered the grounds on the motion, affidavit evidence, grounds of opposition, oral rival submissions, the record and come to the following findings;

a. This suit was commenced by Priska Anyango Ojuang and Jane Mildred Ojuang, the Plaintiffs, against Henry Ojwang Nyabende, the Defendant, through their plaint dated the 8th November 2011. The Plaintiffs seek for declaratory order that the decision of Siaya District Land Disputes Tribunal in Case No. 521 of 1998 adopted in Siaya SRM Civil Suit No. 160 of 1999 was made without jurisdiction, general damages, permanent injunction and costs. That it is apparent from the pleadings that the Land Disputes Tribunal Case had been commenced by the Defendant herein. The Plaintiffs' claim is opposed by the Defendant through the statement of defence dated 16th November 2011, which contained a counterclaim that the Plaintiffs hold a portion measuring about eight (8) acres, of Siaya/South Gem/Gombe/375, in trust for him.

b. That upon realizing that the counterclaim was not accompanied with a verifying affidavit at the time of filing, the Defendant moved the court through the motion dated the 7th February 2015, for leave to file the verifying affidavit out of time. The application was opposed by the Plaintiffs and after interpartes hearing was dismissed through the Court's ruling of 21st February 2018 which among others struck out the counterclaim with costs.

c. The Defendant filed the Notice of Appeal dated the 23rd February 2018, and received by the Deputy Registrar on the 26th

February 2018. The present application dated the 18th September 2018 was then filed.

d. The Defendant's case is that directions have already been taken to converse this suit through the written submissions. That the intended appeal may be rendered nugatory unless the proceedings are stayed. That the appeal is arguable and referred to the case of **Kenya Power & Lightening Company Limited vs Esther Wanjiru Wokabi [2014] eKLR**. That if the proceedings were to continue and judgment date fixed and delivered, the Defendant will have lost the opportunity to have his claim heard alongside that of the Plaintiffs and his counterclaim will be considered res judicata in terms of **Section 7 of the Civil Procedure Act**. That though the application had been brought under **Order 42 Rule 6 of the Civil Procedure Rules**, the Counsel submitted that he had abandoned that provision, and in its place relied on the oxygen provisions. The Learned Counsel referred to the Case of **Permanent Secretary Ministry of Roads & Another vs Feur Investments Limited [2014] eKLR**.

e. The Learned Counsel for the Plaintiffs submitted that the application was filed seven (7) months after the ruling of 21st February 2018, and there has been no explanation tendered for the delay.

f. That having considered the Learned Counsels submission, the Court agrees with Counsel for the Plaintiffs that the current application was filed about seven (7) months after the ruling and the filing of the Notice of Appeal. That the Defendant has not made any attempt to explain the delay that is apparent, and needless to say, inordinate.

g. That further to the findings above, the Plaintiffs' suit is more or less challenging the Tribunal award on the basis of jurisdiction. That even if the Plaintiffs were to be successful in challenging the Tribunal award, on the basis of lack of jurisdiction, the positions of the parties in relation to the suit land will revert to the position they had before the award. That would not be an estoppel to the Defendant's right to pursue what claim he has against the Plaintiffs before a court with jurisdiction in accordance with the law.

h. That the ruling of the 21st February 2018 did not confer any legal rights upon the Plaintiffs over the suit land that they did not have before that date. That conversely the ruling did not take away any rights that the defendant had over the suit land before it. That the only thing that can be executed out of the ruling of 21st February 2018 is the costs that the Plaintiffs were awarded. The order of costs would not suffice to be the basis of stay of proceedings. (See the Court of Appeal decision in **Francis Kabua vs Nancy Wambui & Another [1966] eKLR, Chanase Investment Limited vs Registered Trustee of Kenya Episcopal Conference [1999] eKLR and Sonalux Limited & Another vs Barclays Bank of Kenya Ltd & 2 Others [2008] eKLR**).

i. That the order that the main suit be dealt with through submissions was agreed upon on the 17th September 2014. The Counsel for the Plaintiffs filed and served theirs dated the 23rd January 2015. The Learned Counsel for the Defendant filed and served theirs dated the 27th May 2015, on the 4th June 2015 that is unsigned. That it follows that, the next step now that the interlocutory application that was pending has been dealt with is to fix the suit for judgement. That to do otherwise will be going against the overriding objective of the court set out in **Section 1A of the Civil Procedure Act**.

6. That flowing from the foregoing, the court finds no merit in the Defendant's application dated the 18th September 2018 and it is dismissed with costs.

Orders accordingly.

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE

DATED AND DELIVERED THIS 3RD DAY OF APRIL 2019

In the presence of:

Plaintiffs Absent

Defendant Absent

Counsel M/s Orege for Ragot for Defendants

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE