



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAJIADO

ELC CASE NO. 502 OF 2017

(FORMERLY MACHAKOS ELC NO. 178 OF 2016)

FRANCIS NGANGA MUNDIAPLAINTIFF

VERSUS

ISAAC GATHUNGU WANJOHI.....1ST DEFENDANT

JACKSON SIMEI NKARU PARTERU.....2ND DEFENDANT

SIMON MOLOMA NKARU.....3RD DEFENDANT

COUNTY LAND REGISTRAR, KAJIADO.....4TH DEFENDANT

RULING

What is before me for determination is the 1st Defendant's application dated 15th March, 2019 brought pursuant to Order 42 Rule 6; Order 51 Rule 1 – 3 and 15 of the Civil Procedure Rules and Article 48 of the Constitution. The 1st Defendant seeks for orders to stay the proceedings herein pending the hearing and determination by the Court of Appeal of an intended Appeal to be filed against the ruling dated the 26th February, 2019 in Kajiado High Court Family Division, Miscellaneous Application No. 49 of 2018: Eng. Isaac Gathungu Wanjohi Vs Jackson Simei Nkaru Partetu and Simon Moloma Nkaru.

The Application is premised on the summarized grounds that during the pendency of this suit whose trial commenced on 6th February, 2018, the 1st Defendant/ Applicant referred to the Kajiado High Court Family Division, Miscellaneous Application No. 49 of 2018: Eng. Isaac Gathungu Wanjohi Vs Jackson Simei Nkaru Partetu and Simon Moloma Nkaru for determination of an issue touching on the issuance of a grant to the 2nd and 3rd Defendants herein which enabled them to enter into an agreement for sale of land parcel number KAJIADO/ KAPUTIEI NORTH/ 3169 with the 1st Defendant. Further, that they managed to execute a purported transfer in respect of the said land to the Plaintiff. The 1st Defendant filed summons for revocation of a grant dated the 24th September, 2018 which application was dismissed by Hon. Justice Nyakundi vide his ruling dated the 26th February, 2019. The 1st Defendant has filed an application in the Court of Appeal seeking leave to Appeal against the said ruling. The 1st Defendant is the lawful registered owner of the suit property which he purchased in January, 1994 and he was issued with a title deed by the Kajiado Land Registry. The jurisdiction of the Court has been extended by Order 40 rule 10 of the Civil Procedure Rules which empowers the court to make such orders for preservation of any property which is subject matter in a suit as it deems fit. It is in the interest of justice if the orders sought are granted.

The application is supported by the affidavit of ENGINEER ISAAC GATHUNGU WANJOHI the 1st Defendant herein where he deposes that the trial in this matter has commenced and the Plaintiff has testified but yet to call his other witnesses. He explains that after being aggrieved with the Ruling of Justice Nyakundi, he applied for leave to appeal but the said application was declined. He confirms filing a Notice of Appeal and applied for proceedings to enable him lodge the same in the Court of Appeal. He sought for leave from the Court of Appeal, to Appeal against the Ruling. He claims the Ruling of the High Court determined this case. Further, that the High Court has usurped the jurisdiction of this Court and the said Ruling contravenes his right to a fair trial.

The Plaintiff filed a Notice of Preliminary Objection in respect of the instant application stating that the Court is devoid of jurisdiction as it is only empowered to hear matters to do with the use, occupation and rights to land as enshrined under Article 162(2) (b) of the Constitution as read together with the Environment and Land Court Act but not succession matters. Further, that the Honourable Court is functus Officio having previously ruled on a similar application.

The Applicant filed his written submissions that I have considered.

Analysis and Determination

Upon consideration of the application dated the 15th March, 2019 including the supporting affidavit, Notice of Preliminary Objection as well as the submissions filed herein, the only issue for determination is whether the proceedings herein should be stayed pending the outcome of the intended Appeal.

The Applicant has filed a Notice of Appeal in respect of the Ruling in the High Court Family Division dated 28th February, 2019. The Applicant has further filed an application to the Court of Appeal seeking leave to appeal against Justice Nyakundi's Ruling dated the 28th February, 2018. He hence seeks for an order to stay the proceedings herein as it relates to the Kajiado High Court Family Division, Miscellaneous Application No. 49 of 2018: Eng. Isaac Gathungu Wanjohi Vs Jackson Simei Nkaru Partetu and Simon Moloma Nkaru. The Plaintiff has opposed the application and insists this Court lacks jurisdiction to deal with a matter touching on succession and further that the Court became functus officio as it had dealt with a similar application earlier.

In the case of **Global Tours & Travels Limited; Nairobi HC Winding Up Cause No. 43 of 2000** Ringera J (as he then was) when dealing with an application for stay of proceedings pending appeal, had this to say:

“As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of Justice the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously” (emphasis added)

From the evidence before me, I note the Applicant seeks to stay the proceedings herein as he seeks to Appeal against a Ruling in respect of a succession matter which this Court does not have jurisdiction over, The Applicant has admitted he is yet to be granted leave to Appeal from the High Court ruling. I note the matter herein is part heard and is already three years old and I opine that stay sought by the Applicant would actually hamper the expeditious disposal of the instant case. At this juncture I am unable to grant a stay as requested but direct the matter to be set down for hearing.

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

Dated signed and delivered in open court at Kajiado this 28th day of May, 2019

CHRISTINE OCHIENG

JUDGE