



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 226 OF 2017

WIBESO INVESTMENT LIMITED.....1ST PLAINTIFF/RESPONDENT

NOVICOME LIMITED.....2ND PLAINTIFF/RESPONDENT

VERSUS

TAMARIND MEADOWS LIMITED.....1ST DEFENDANT/APPLICANT

CHIEF LAND REGISTRAR.....2ND DEFENDANT/RESPONDENT

DIRECTOR, DIRECTORATE

OF CRIMINAL INVESTIGATIONS.....3RD DEFENDANT/RESPONDENT

DIVISIONAL CRIMINAL INVESTIGATION

OFFICER CENTRAL.....4TH DEFENDANT/RESPONDENT

DANIEL NJUKI5TH DEFENDANT/RESPONDENT

THE HON. ATTORNEY GENERAL.....6TH DEFENDANT/RESPONDENT

RULING

1. On 26th October, 2018, this court dismissed the 1st Defendant's Application dated 17th March, 2018. In the said Application, the 1st Defendant sought for leave to amend the 3rd Party Notice and for recalling of its witnesses. The 1st Defendant has now filed an Application dated 5th December, 2018 in which it is seeking for the following orders:

a. That this Honourable Court be pleased to grant a stay of further proceedings in this suit pending the lodging and hearing of the 1st Defendant/Applicant's intended Appeal against the Ruling of this Honourable Court made on 26th October, 2018, declining the 1st Defendant's Application dated 17th March, 2018.

b. That as an alternative to prayers (3) and (4) above, this Honourable Court be pleased to consolidate this suit with Nairobi High Court Commercial & Admiralty Division, Civil Case No. 539 of 2012: Kenya Commercial Bank Ltd vs. Tamarind Meadows Ltd, Tamarind Properties Ltd, Kennedy Otieno Ogwaro, Joseph Mungai and David Kitwai Ngonda.

c. That as an alternative to (5) above, this Honourable Court be pleased to order that this suit and the said Nairobi High Court Commercial & Admiralty Division, Civil Case No. 539 of 2012: Kenya Commercial Bank Ltd vs. Tamarind Meadows Ltd, Tamarind Properties Ltd, Kennedy Otieno Ogwaro, Joseph Mungai and David Kitwai Ngonda, be heard by the same Judge in the Commercial Division one after the other.

2. The Application is supported by the Affidavit of the 1st Defendant's/Applicant's Director who has deponed that the Applicant has filed an Appeal in respect of the Ruling of this court dated 26th October, 2018; that this court has the jurisdiction to make orders for the preservation of the suit property; that the court ought to balance the relative hardships which will arise during the pendency of an intended Appeal and that the practice of the court is to maintain the status quo obtaining at the time the decision appealed against is made.

3. The Defendant's/Applicant's advocate submitted that after the Ruling was delivered by the court, the Applicant applied for a stay of

further proceedings but the same was declined at that stage; that the court ordered that it files a formal Application and that the Application should be allowed.

4. According to the Defendant's/Applicant's Director's Affidavit, the issue in dispute in this suit is also in dispute in Nairobi HCCC No. 539 of 2012; that in the Nairobi suit, the 1st Defendant issued a 3rd Party Notice to the Attorney General (*the 6th Defendant herein*); that the 6th Defendant admitted in the Nairobi suit that the 1st Defendant/Applicant is the registered proprietor of the suit land and that the 1st Defendant is seeking for indemnity of Kshs. 600,000,000 from the 1st Defendant.

5. It is the 1st Defendant's/Applicant's deposition that the Plaintiff filed this suit after the court in Nairobi HCCC No. 539 of 2012 declined its Application for joinder and that the two suits should either be consolidated or be heard by one Judge one after the other so that the issue of title may be resolved as between the state and the holders of titles from it.

6. In reply, the Plaintiffs' Director deponed that the order for stay of proceedings cannot be granted because the same is res judicata; that the Application for stay of proceedings was declined on 26th October, 2018 and that this court does not have the jurisdiction to consolidate this matter with Nairobi HCCC No. 539 of 2012.

7. According to the Plaintiff, when it filed an Application to be joined in Nairobi HCCC No. 539 of 2012, the said Application was opposed by all the parties, including the 1st Defendant/Applicant; that the hearing of this suit is lawful and poses no threat, danger or risk of execution or alienation of the suit land and that an order of stay cannot issue on a negative order, which cannot be executed.

8. It is the Plaintiffs' case that the 1st Defendant's acts of seeking to stay the proceedings is with the intention of delaying justice; that the Applicant has admitted of having claimed indemnity against the 2nd Defendant in Nairobi HCCC No. 539 of 2012 and that in any event, the 1st Defendant/Applicant was granted an opportunity to claim indemnity in this matter which it exercised.

9. On his Part, the 2nd Defendant deponed that the 1st Defendant has already conducted its case twice, including re-opening its case when the 2nd to 6th Defendants were scheduled to conduct their Defences; that the 2nd Defendant is in the middle of his case and that no good reason has been given from stopping the 2nd Defendant from concluding his Defence.

10. According to the 2nd Defendant, it is not true that the 1st Defendant was directed to file a formal Application for stay of proceedings; that while arguing Nairobi HCCC No. 539 of 2012, the 1st Defendant/Applicant admitted that the two causes of action were not the same and that in any event, the 1st Defendant has an indemnity claim as against the 2nd Defendant in Nairobi HCCC No. 539 of 2012.

11. The Interested Party, Kenya Commercial Bank, through its Legal Officer, deponed that on 11th December, 2018, the court in Nairobi HCCC No. 539 of 2012 stayed its proceedings pending the outcome of the current Application; that in declining to have the Interested Party joined in this suit, this court noted that the issue in dispute herein is one of ownership of land which did not involve the Bank; that in Nairobi HCCC No. 539 of 2012, the court found that there was no common question of fact or law between the two suits and that the jurisprudence on whether charges form part of land use was settled by the Court of Appeal in the case of ***Co-operative Bank of Kenya Limited vs. Patrick Kangethe Njuguna & 5 Others (2017) eKLR***.

12. The Interested Party's Legal Officer deponed that the cause of action in Nairobi HCCC No. 539 of 2012 is of a commercial nature, namely recovery of monies lent by the Bank and that the Plaintiff in Nairobi HCCC No. 539 of 2012 has always been ready to prosecute the suit. Both the 1st Defendant and the Interested Party filed Further Affidavits which I have considered.

13. The 1st Defendant's/Applicant's advocate submitted that Order 40 Rule 10 of the Civil Procedure Rules empowers the court to make such orders for preservation of any property which is the subject matter of a suit; that courts are enjoined to act fairly and justly, to have regard to the substantive justice of the matters before them and weigh the relative hardships of parties before them.

14. The 1st Defendant's/Applicant's advocate submitted that a stay of these proceedings will not prejudice the Plaintiffs who appear to have just looked on as the 1st Defendant developed the suit properties; that the suit properties have been developed since the year 2008; that the Court of Appeal may take a different view of the matter sought to be appealed against and that consequently, the subject matter must be preserved.

15. The 1st Defendant's counsel submitted that since the Nairobi suit has not begun, the trial of the two suits will expedite the resolution of the dispute and that the consolidation of the two suits or the trial of the two suits by one Judge will avoid the issuing of two conflicting Judgments. Counsel relied on numerous authorities which I have considered.

16. The Plaintiffs' advocate submitted that the 1st Defendant's Application is prejudicial to the expeditious disposal of the suit; that the issues raised in the current Application are res judicata and that this court cannot hear the matters that it has no jurisdiction to hear.

17. The Plaintiffs' advocate submitted that the Plaintiffs herein do not have a cause of action in Nairobi HCCC No. 539 of 2012 and that the joinder or consolidation of the two suits will distort, embarrass and impede fair trial.

18. On the issue of stay of proceedings, the Plaintiffs' advocate submitted that negative orders cannot be stayed as they are incapable of execution; that the 1st Defendant has not proved any substantial loss that it will suffer if the proceedings are not stayed and that the Application should be denied.

19. Counsel submitted that the departure by the 1st Defendant from its earlier position in Nairobi HCCC No. 539 of 2012 is an abuse of the court process; that the 1st Defendant should not be allowed to reprobate and approbate at the same time and that the 1st Defendant's Application should be dismissed.

20. The 2nd-6th Defendants' Advocate submitted that the 1st Defendant opposed the joinder of the Plaintiffs herein in Nairobi HCCC No. 539 of 2012 on the ground that the issue of title could not be ventilated in the suit, and that the two suits are not capable of being consolidated.

21. The 2nd-6th Defendants' advocate submitted that the orders of stay of proceedings relates to a negative order dismissing an Application for amendment and that the entire Application should be dismissed.

22. The Interested Party's advocate submitted that there is no commonality or similarity of issues in the two cases and that granting the prayer for consolidation will not only lead to confusion and delay in resolution of the individual cases but will prejudice the Interested Party.

23. The Interested Party's advocate submitted that while dealing with the Plaintiff's Application for joinder in Nairobi HCCC No. 539 of 2012, Olga Sewe J. found that there were no common questions of fact or law that could be discerned between the Plaintiffs' claim and the claim of the 1st Interested Party and the 1st Defendant.

24. Counsel submitted that the 1st Defendant is estopped from contending that the causes of action in the two suits are the same and that the Application is an abuse of the court process.

25. In his Supplementary submissions, the Applicants'/1st Defendant's counsel submitted that the order of stay of proceedings should be granted due to the substantial loss and prejudice that would be occasioned if the stay is not granted; that this court should follow the previous decisions of the High Court and that this court is well placed to deal with issues of mortgages, charges, ownership of land and eviction.

Analysis and findings:

26. Despite the lengthy Affidavits and written submissions by the parties in this matter, the simple issue that this court is supposed to deal with is whether these proceedings should be stayed pending the intended Appeal by the 1st Defendant and whether this matter should be consolidated with Nairobi High Court Commercial & Admiralty Division, Civil Case No. 539 of 2012 (*Nairobi HCCC No. 539 of 2012*).

27. The law pertaining to a stay of proceedings or execution of an order or decree is provided for under Order 42 Rule 6(2) of the Civil Procedure Rules. The said Order provides as follows:

(2) No order for stay of execution shall be made under sub rule (1) unless-

(a) the court is satisfied that substantial loss may result to the Applicant unless the order is made and that the Application has been made without unreasonable delay; and

(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the Applicant."

28. A brief background of this matter will suffice. In their Plaint dated 15th May, 2017, the Plaintiffs alleged that the 1st Plaintiff is the registered proprietor of a parcel of land grant number I.R. 72481, L.R. No. 18469 and which was registered in its name on 13th March, 1997. However, in the year 2009, the Plaintiffs became aware that the 1st Defendant had commenced construction of houses on the same land without the 1st Plaintiff's permission. The Plaintiffs have sought for several prayers in the Plaint, including a declaration that the grant for L.R. No. 18469 issued to the 1st Plaintiff is the only valid and genuine title and that the title that the 1st Defendant is holding is fraudulent, invalid, non-existent, null and void.

29. In the Defence, the 1st Defendant averred that it is holding a grant in respect to L.R. No. 18469 lawfully having purchased the same from Volta Insurance Consultancy Limited for Kshs. 51 million. The 2nd-6th Defendants filed a Defence in which they admitted the validity of the 1st Plaintiff's title. In the Defence, the 2nd-6th Defendants averred that the grant that was registered in favour of the 1st Defendant on 18th June, 2008 was not genuine.

30. The record shows that on 29th September, 2017, the 1st Defendant filed a "Notice of Claim against Co-Defendants" which was addressed to the 2nd and 6th Defendants. In the said Notice, the 1st Defendant stated as follows:

"The 1st Defendant herein claims against you indemnity and/or contributory for any loss that may be suffered by it due to the negligent acts and omissions on your part or your agent."

31. It is not clear to this court if the Third Party was ever served with the Third Party Notice. However, the trial of this matter began on 8th November, 2017 when PW1 and PW2 testified. The Plaintiffs closed their case on that day. The 1st Defendant's case began on 20th November, 2017. Although the 1st Defendant's advocate closed the 1st Defendant's case on 20th November 2017 after calling one witness, he applied for the re-opening of the case when the matter came up for the hearing of the 2nd-6th Defendants' case on 22nd January, 2018. The Application by the 1st Defendant's advocate for re-opening of its case was allowed by the court on the said date and DW2 was allowed to testify. On the same day, the 1st Defendant's advocate closed its case and the court took the evidence of the witnesses of the 2nd-6th

Defendants.

32. By way of an Application dated 17th March, 2018, the 1st Defendant/Applicant sought for leave to amend the 3rd Party Notice which it had issued against the 2nd and 6th Defendants. In the same Application, the 1st Defendant sought for leave to recall its witnesses to testify in the matter. That Application was dismissed by this court on 26th October, 2018.

33. The record shows that upon the dismissal of the Application dated 17th March, 2018, the 1st Defendant's/Applicant's counsel applied for a copy of proceedings, the Ruling and for a stay of proceedings. The oral Application for stay of proceedings by the 1st Defendant's counsel was opposed by the Plaintiffs' counsel. In its short Ruling, this court held as follows:

“The parties to be supplied with a copy of the proceedings and Ruling. The Application for stay of proceedings is declined. This matter to proceed for hearing on 24th January, 2019. Hearing notices to issue.”

34. The record does not show that the dismissal of the oral Application for a stay of proceedings was subject to the filing of a formal Application. Indeed, considering that the order disallowing the oral Application was final in its nature, the 1st Defendant should have filed the current Application (*for stay of proceedings*) in the Court of Appeal.

35. Indeed, the oral Application by the 1st Defendant's counsel for a stay of proceedings or execution is allowed under Order 42 Rule 6 (5) of the Civil Procedure Rules. Where such an Application is made, the court has the discretion of dealing with the Application summarily or directing that a formal Application be filed. In the instant case, the court dismissed the 1st Defendant's oral Application and directed the parties to appear before it on 24th January, 2019 for the hearing of the main suit, and not for the hearing of a formal Application for stay of proceedings.

36. That being the position, I find that this court has already dealt with the issue of stay of proceedings. The court cannot therefore revisit same issue lets its accused, and correctly so, of sitting on its own Appeal.

37. Even if its argued that the date of 24th January, 2019 that was given by the court was for the hearing of a formal Application for stay of proceedings, I would still not allow such an Application for the reason that the 1st Defendant has not shown the substantial loss that it shall suffer if the suit proceeds for hearing to conclusion.

38. Indeed, the evidence that has already been adduced by the Plaintiffs and that Defendants shows that it is the 1st Defendant who is in possession of the suit property. That being the case, and until it is shown that the order of 26th October, 2018 has the effect of dispossessing the 1st Defendant of the suit land, the 1st Defendant cannot claim that the suit property will dissipate unless the order of stay of proceedings is granted.

39. As was held in the case of *African Safari Club vs. Safe Rentals Limited, Nairobi Civil Appeal No. 53 of 2010*, in an Application for a stay of execution or proceedings, the court treats the Decree holder and the Judgment debtor equally and fairly by balancing the relative hardships which will arise during the pendency of an intended Appeal. In the *African Safari Club case (supra)*, the Court of Appeal held that the practice of the court is to maintain the status quo obtaining at the time the decision appealed against is made.

40. The prevailing status quo in this matter is that the 1st Defendant is in possession of the suit land. The mere fact that the court dismissed its Application to amend a 3rd Party Notice and to recall its witnesses does not change that status quo. Until the court makes a final determination about the ownership of the suit land, or on the issue of the 3rd Party Notice that was filed by the 1st Defendant, it cannot be argued that the prevailing status quo is going to change.

41. I am in agreement with the 1st Defendant's submissions that even where the order appealed is negative in nature, the proceeding of the court may be stayed pending the hearing of an Appeal. However, and was held by Ringera J. in *Global Tours & Travels Limited -Winding up Cause No. 43 of 2000*, the stay of such proceedings is a matter of judicial discretion to be exercised in the interest of justice. In the said matter, the court stated as follows:

“... the sole question is whether it is in the interest of justice to order for stay of proceedings and if it is so, 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.”

42. One of the reasons that this court gave for refusal to allow the 1st Defendant/Applicant to amend the 3rd Party Notice and to re-call its witnesses was because both the Plaintiffs and the 1st Defendant had closed their respective cases. Any further stalling of these proceedings, which are at the tail-end, will empede the expeditious disposal of the matter.

43. In any event, the intended Appeal by the Appellant will still be alive even after this matter is concluded. In the event the court makes a finding in favour of the Plaintiffs, the 1st Defendant will still have an opportunity to argue the Appeal in respect of the Ruling(s) of this court. The 1st Defendant's right to argue the Appeal will not be curtailed in any way if these proceedings are concluded. It is for those reasons that I decline to order for a stay of proceedings in this matter.

44. The 1st Defendant is seeking for the consolidation of this suit with **Nairobi HCCC No. 539 of 2012: Kenya Commercial Bank Limited vs. Tamarind Meadows Ltd & Others**. This prayer is premised on the ground that the issues in dispute are similar in both cases. The Plaintiffs, the 2nd-6th Defendants and the Interested Party (*was only enjoined in these proceedings for the purposes of arguing this Application*) have opposed that prayer.

45. Although the 1st Defendant/Applicant has argued that the issues in this matter are the same as the issues raised in Nairobi HCCC No. 539 of 2012, it did not avail to this court the pleadings in Nairobi HCCC No. 539 of 2012. This court does not therefore have the benefit of the pleadings in Nairobi HCCC No. 539 of 2012 to ascertain the 1st Defendant's contention that the causes of action in both suits are the same or related.

46. However, from the Ruling of the court in Nairobi HCCC No. 539 of 2012 dated 17th December, 2015, the High Court dealt with the relationship of the Plaintiffs' claim viz-a-viz the claim of the parties in Nairobi HCCC No. 539 of 2012.

47. The Ruling of the court in Nairobi HCCC No. 539 of 2012 shows that on 30th September, 2014, the 1st Plaintiff herein sought to be enjoined in Nairobi HCCC No. 539 of 2012 as an Interested Party. In her Ruling of 17th December, 2014, Olga Sewe J. held as follows:

“Thus on 23rd August, 2012, this suit was instituted for the recovery of Kshs. 199,037,649 that was due as at 15th May, 2012 together with interest following the 1st Defendant's default in servicing the loan account... Upon careful consideration of the pleadings herein, the court is in no doubt that the cause of action herein is indeed of a commercial nature, namely for recovery of monies lent by the Bank, upon a legal charge provided by the Defendants on L.R. No. 18469, Mavoko Municipality. In the premises, I would agree with counsel for the parties that it would be far-fetched, for the 1st proposed Interested Party (the Plaintiff herein) to argue that the subject matter revolves around ownership of land. As there appears to be no common question of facts or law that can be discerned as between the Plaintiff, the Defendants and the 1st Interested Party, the outcome of which will affect the proposed 1st Interested Party.”

48. In the same Ruling, the court held as follows:

“19. In similar vein, it would be improper for the court to allow joinder of parties whose intention is to completely take over and turn the cause into a forum for ventilation of grievances that are patently alien to the cause of action as conceived and envisaged by the parties herein.”

49. With the said findings, the court locked out the 1st Plaintiff herein from participating in Nairobi HCCC No. 539 of 2012.

50. The Interested Party herein has annexed the Affidavit that was filed by the 1st Defendant's/Applicant's Director in Nairobi HCCC No. 539 of 2012. While opposing the joinder of the 1st Plaintiff herein in the Nairobi suit, the 1st Defendant's/Applicant's Director deponed as follows:

“3. That I am advised by our Advocates on record and verily believe it to be true that the present suit is of a commercial nature...

4. That as between the Plaintiff and the Defendant there is no issue as to title of the property which the Honourable Attorney General in his Defence conceded that there were no impediments to the registration of the Sub-Leases.

5. That the proposed Interested Party's alleged complaints, if at all, should thus be the subject of a totally different suit, against some other party not the Plaintiff and Defendants.”

51. The 1st Defendant's/Applicant's Director having deponed that the Plaintiffs' claim herein is not related with the Plaintiff's (*Kenya Commercial Bank*) claim in the Nairobi suit cannot now turn around and state that the causes of action in the two suits are related. Indeed, the court made a final finding that the Plaintiffs' claim herein is different and distinct from the claim by Kenya Commercial Bank in the Nairobi matter, which is purely commercial in nature.

52. Considering that a court of concurrent jurisdiction has made a final finding on the commonality of issues in the two matters, and the 1st Defendant having opposed the joinder of the 1st Plaintiff herein in the Nairobi suit on the ground that its claim is different and distinct from the claim by Kenya Commercial Bank, I find and hold that the two suits can neither be consolidated nor heard one after the other by the same Judge. The two suits should run their courses distinctly and independently.

53. In any event, the hearing of this suit is at its tail-end. Indeed, both the Plaintiffs and the 1st Defendant have closed their respective cases. When the matter came up for pre-trial directions, the issue of consolidating the two suits never arose. Considering that the 1st Defendant proceeded with its case without raising the issue of consolidating the two matters, it cannot now raise the issue of consolidating the two matters at this stage. Granting such an order will not only be prejudicial to the Plaintiffs, but will also be against the provision of Article 159(2) (b) of the Constitution which obligates courts not to delay justice.

54. For those reasons, I find the 1st Defendant's/Applicant's Application dated 5th December, 2018 to be unmeritorious. The Application is therefore dismissed with costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 24TH DAY OF MAY, 2019.

O.A. ANGOTE

JUDGE