



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC. APPEAL NO. 55 OF 2018

WINFRED MUMBUA MAKAU.....1ST APPELLANT

JOHN MUIA MAKAU.....2ND APPELLANT

BENARD MUSYOKA MUNYAO.....3RD APPELLANT

VERSUS

HELLEN SYOKAU NJAGI.....RESPONDENT

RULING

1. In the Notice of Motion dated 5th December, 2018, the Appellants are seeking for the following orders:

a. That the proceedings pending in the lower court at Kangundo Law Courts being SPM ELC. No. 76 of 2018 be stayed until this Appeal is heard and determined.

b. The costs of this Application be in the cause.

2. In his Affidavit in support of the Application, the 3rd Appellant has deponed that the Respondent filed a suit in the lower court at Kangundo SPM ELC. No. 76 of 2018 against the Appellants; that the Respondent applied for an order of injunction and that before the said Application was heard, the Appellants filed a Preliminary Objection.

3. According to the 3rd Appellant, their Preliminary Objection was dismissed; that the dismissal of the Preliminary Objection is the subject of the Appeal herein and that the Appeal shall serve no purpose if the lower court case proceeds before the Appeal is heard and determined.

4. In reply, the Respondent deponed that after the determination of the Preliminary Objection, the Appellants' advocate participated in the hearing of the matter in the lower court; that the Appellants' advocate has never served her advocate with a Memorandum of Appeal and that the Application in the lower court for an injunction has since been heard.

5. In his submissions, the Appellants' advocate submitted that the Appeal raises arguable grounds involving very important points of law including jurisdictional issues; that the proceedings in the lower court should be stayed to avoid a situation where the lower court makes a determination in the matter and then this court rules that it does not have the requisite jurisdiction and that such an exercise will be in vain and a waste of the court's time and resources.

6. The Appellants' advocate finally submitted that the Appeal is arguable and has a high probability of success and that if the Appellants were to succeed, then the case shall be rendered a mere academic exercise unless a stay is granted.

7. On his part, the Respondent's advocate submitted that the Application is an afterthought, an abuse of the court process and calculated to frustrate the lower court's matter and that in any event, the Appellants have been participating in the lower court's proceedings even after the delivery of the impugned Ruling of the lower court.

8. The Respondent's counsel submitted that the Application was not filed timeously; that the Appellants have never served on him the Memorandum of Appeal and that the Application should be dismissed with costs.

9. In their Memorandum of Appeal dated 30th July, 2018 and filed on the same day, the Appellants have averred that the learned Magistrate

erred when he held that the lower court had jurisdiction to hear the suit; that the pleadings in the lower court showed that the Respondent was making a claim through a past member of the 1st Defendant and that the learned Magistrate erred when he failed to hold that the suit was time barred.

10. The Appellants finally averred in their Memorandum of Appeal that the learned Magistrate erred by failing to consider that from the pleadings before the court, there was no cause of action against the Appellants and that the learned Magistrate erred when he failed to hold that the Respondent had no Letters of Administration on behalf of her father whom she claimed was allocated the suit land.

11. The Plaintiff that was filed in Kangundo SPMCC No. 76 of 2018 shows that the Respondent herein sued the Appellants, together with Muka Mukuu Farmers' Co-operative Society Limited (*the 1st Defendant*). In the said Plaintiff, the Respondent alleged that she is the legitimate owner of plot numbers 008, 009, 295, 296 and 340, the said plots having been given to her through her father's membership in the Society (*the 1st Defendant*).

12. The Respondent further averred that when her father died, it dawned on her that the plots had been fraudulently transferred to the Appellants. The orders that the Respondent sought in the lower court include: a declaration that the suit plots belong to her and an order directing the 1st Defendant to correct the fraud by cancelling the entries in its records.

13. In their Defence, the Appellants denied the allegations raised in the Plaintiff. The Appellants further averred that the prayers sought in the Plaintiff cannot be given because the court does not have jurisdiction to hear the suit. According to the Appellants [*Defendants*], the dispute can only be resolved by the Co-operative Tribunal since all the parties to the suit are either present or past members of a Co-operative Society (*the 1st Defendant*).

14. It is the objection in respect of the jurisdiction of the court that was argued before the learned Magistrate that is the subject of the current Appeal. In the meantime, the Appellants are seeking for an order staying the proceedings in the lower court pending the hearing of the Appeal.

15. The general principle in granting or refusing a stay of proceedings pending the hearing of an Appeal is that if there is no other overwhelming hindrance, a stay must be granted so that an Appeal may not be rendered nugatory should the decision be reversed (*See Butt vs. Rent Restrictions Tribunal (1982) KLR 417*). In addition, for a party to be granted a stay of proceedings like in this case, he has to show that he has an arguable Appeal.

16. In his Plaintiff, the Respondent averred that she is "*the legitimate owner of plot numbers 008, 009, 295, 296 and 340 under Land Parcel Membership Member 2580 of Muka Mukuu Farmers' Co-operative Society Limited*", the said plots having been given to her through her father's membership to the Society.

17. In the same Plaintiff, the Respondent averred as follows:

"At all material time to this suit the Plaintiffs' deceased father was a registered shareholder No. 1626 of Muka Mukuu Farmers' Co-operative Society Limited, and further held plots number 008, 009, 295, 296 and 340 on behalf of the Plaintiff."

18. On the other hand, the Appellants averred in their Defence as follows:

"2. The 2nd, 3rd, and 4th Defendants (Appellants) do state that they are members of the 1st Defendant (the Society)..."

19. Section 76(1) of the Co-operative Societies Act provides as follows:

"(1) If any dispute concerning the business of a co-operative society arises—

(a) among members, past members and persons claiming through members, past members and deceased members; or

(b) between members, past members or deceased members, and the society, its Committee or any officer of the society; or

(c) between the society and any other co-operative society, it shall be referred to the Tribunal."

20. Considering the averments in both the Plaintiff and the Defence, it is safe to state that the issue of whether the lower court has the jurisdiction to hear and determine the dispute before it or not is not frivolous. Indeed, considering how pertinent the issue of jurisdiction is in any proceedings, the Appellants should be given an opportunity to argue that issue before this court before the matter can proceed any further in the lower court.

21. Indeed, if the lower court proceeds to hear the substantive suit, the Appeal filed by the Appellants will be rendered an academic exercise because the matter would have been finalized. Considering that the main suit has not been heard and determined by the lower court, the suit should be held in abeyance and await the determination of whether the court has jurisdiction to hear the dispute or not.

22. For those reasons, I allow the Application dated 5th December, 2018 as prayed.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 26TH DAY OF JULY, 2019.

O.A. ANGOTE

JUDGE