



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MURANG'A

ELC NO. 143 OF 2017

LUCY GATHONI KIRERU.....PLAINTIFF/APPLICANT

VS

JAMES KARUKU KIRERU.....DEFENDANT/RESPONDENT

RULING

1. The applicant Plaintiff filed the Notice of Motion dated 7/11/2017 seeking the following orders;

a. That this suit be stayed pending the hearing and determination of the summons for revocation of grant in Kangema Succession Cause No. 79 of 1979.

b Costs of to be provided.

2. The application is premised on the grounds that it is necessary for the Kangema SPMCC Succession Cause No. 79 of 1979 be heard first as it may have a decisive bearing on the matters in issue in the case before this Court hence the need to stay the current suit. Secondly that it will not be prejudicial to the Respondent in this case as he is also a party to the suit at Kangema.

3. The application is supported by the affidavit of Lucy Gathoni Kireru who deposes that after she learnt from the Defendants defence that the Defendant succeeded the suit property vide the Kangema Succession Cause No. 79 of 1979. That the succession cause in respect to her father's estate was decided in her absence and no provision was made for her. She has since filed summons for revocation of the grant therein. She avers that the Kangema matter is now pending for determination and since she is of the view that there is likelihood for the Court to redistribute the estate it is necessary to stay the current suit.

4. The Defendant Respondent filed his grounds of opposition to wit that the applicant seems to be uncertain of the cause of action to take and is playing a game of chance. That the applicant has just obtained injunctive orders against the Respondent from this Court and wants to enjoy them for an indefinite period of time. That the outcome of the two matters are not interrelated as one is purely a land matter and the other a succession matter. That the Defendant has not insisted that he got the land from their father as alleged by the applicant. That the application is an abuse of the Court process.

5. The Respondent later filed his replying affidavit in opposition to the application in which he claims that the applicant has failed to reveal to this Court that their late father had more parcels of land other than the one in issue. He also raised several issues relating to the application before the Kangema Court such as the incorrect list of beneficiaries, the witnesses before the Kangema Court are not the ones referred to in the Summons and the nondisclosure of the reasons for disinheriting all the daughters of the family. Those issues will be substantively dealt with by the Kangema court.

6. The applicant in her written submissions highlights that the issues raised in the replying affidavit strictly relate to the Kangema matter which in her view shows the importance of having the Kangema matter determined first. She claims that even though the two matters are different they both are intricately intertwined as both relate to contested ownership of the suit land. That since the Respondent claims to have acquired the land through a succession cause over their father's estate it is necessary for the succession matter to be heard first in order to determine if the rights of the applicant were infringed. That the applicant was unaware of the succession matter until this suit was filed. She is of the view that section 6 of the Civil Procedure Rules does not strictly apply to this application as the succession matter came first and it's through it that the Respondent acquired the suit land. She maintains that it is not prudent to withdraw the current suit at this stage and invites the Court to invoke the provisions of Article 159(d) of the Constitution in her favour.

7. The Defendant Respondent submits that as per the provisions of section 6 of the Civil Procedure Rules the current suit was previously instituted having been filed on 14/2/2017 while the Summons for revocation at Kangema were filed on 8/7/2017, therefore the Kangema matter is the one that ought to be stated. Further that the matters in issue on both suits are not substantially and directly in issue as the

proceedings are not between the same parties and they are not all relating to entirely the same parcel of land. And claims that if the Kangema suit succeeds the subject matter of the current suit will cease to exist therefore the applicant should withdraw either of the suits instead of asking for stay. He claims that the since the applicant instituted the Kangema suit while the current suit was ongoing it was done in bad faith.

8. It is on record that the Defendant acquired title of the suit land under a succession cause No 79 of 1979 in which the Defendant and his brother Kihumba Kireru were declared owners of Loc 14/Kairo 114 to share in equal shares. It is also on record that the said parcel of land was later subdivided into two portions; Loc 14/Kairo/2218 and 2219. Loc 14/Kairo/2218 was registered in the name of the Defendant and it is the parcel that the Plaintiff is claiming that the Defendant holds 1.5 acres in trust for her and is the crux of the suit before this Court. The Defendant has denied the claim. She claims to occupy ½ acre of the suit property, a claim that is admitted by the Defendant.

9. It is the Plaintiff's case that she learnt from the Defendants defence that the Defendant acquired the suit land pursuant to a succession cause aforesaid which she claims to have been done in her absence and hence no provision was made for her notwithstanding that she is a child of the deceased and was entitled to inherit the said property. This prompted her to file an application before the Kangema Court seeking a revocation of grant and provision for her in the estate of her deceased father. It is her contention that the Kangema case has a high likelihood of determining the matter to its conclusion and thus the current suit should be stayed to await the outcome of the succession revocation application. She avers that there is no prejudice that the Defendant will suffer should the Court grant the same.

10. Section 6 of the Civil Procedure Act states as follows;

“No Court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other Court having jurisdiction in Kenya to grant the relief claimed”.

The purpose of this rule is to prevent courts from simultaneously trying parallel suits in respect of the same subject matter in issue. It is necessary that the matter in issue in the subsequent suit should also be directly and substantially in issue in the first suit and for the same relief as claimed in the first suit. The prayers in this suit are declarations that the Plaintiff is entitled to 1.5 acres held by the Defendant in trust for her. In the Kangema application the Plaintiff is seeking to revoke a succession cause so that she is provided for through redistribution of the suit land measuring 1.5 acres. Contrary to the Defendants submission that the matter in issue is not directly and substantially in issue in both cases, clearly the matter in issue boils down to ownership of 1.5 acres of land that the Plaintiff is asserting a right either under trust or by way of succession proceedings. The conclusion in Kangema application affects this instant suit. In my considered view the application to stay the current suit is not misplaced. It is true that the Court in Kangema cannot grant a relief in trust however it has jurisdiction to make orders for revocation/make provisions (if it is merited) for the Plaintiff and the said revocation/provisions will affect the rights of any person, the Defendant included in this case.

11. Further the Defendant has not demonstrated how he will be prejudiced by the Court granting the application. I must add that I am satisfied that I find no abuse of process of Court in the applicant moving this Court to stay these proceedings.

12. Finally, the application is meritorious and it is granted. The parties being blood siblings, each party to meet their own costs.

DATED, DELIVERED AND SIGNED AT MURANG'A THIS 23RD DAY OF FEBRUARY, 2018.

J G KEMEI

JUDGE