



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

THIKA LAW COURTS

ELC CASE NO.234 OF 2017

BERNARD GACHIE KAMAU.....PLAINTIFF/RESPONDENT

-VERSUS-

LIVINGSTONE W. KINYANJUI & 23 OTHERS.....DEFENDANTS/APPLICANTS

RULING

The matter for determination is the *Notice of Motion* application dated **1st August 2017** brought by the **2nd – 17th Defendants/Applicants** herein and which application is premised under Sections 1A, 1B & 3A of the civil Procedure Act Cap 21 Laws of Kenya. The Applicants have sought for the following orders:-

1) That the Honourable Court be pleased to stay proceedings in this suit pending the hearing and final determination of CMCC.No.879 of 2010, at Thika Law Courts.

2) That costs of this application be provided for.

The application is supported by the grounds stated on the face of the application and on the *Supporting Affidavit* of **Fredrick Nganga Thuo**, the 2nd Defendant herein. These grounds are:-

1) That there exists a suit filed at the Chief Magistrate's Court in Thika, being CMCC No.879 of 2010, in which the subject matter is the same as the subject matter in the instant suit.

2) That the Plaintiff and the 1st – 17th Defendants are parties to CMCC No.879 of 2010, Thika with the Plaintiff being the Defendant therein while the 1st – 17th Defendants are the Plaintiffs.

3) That the issues of fact and law for determination in both suits filed in separate courts with jurisdiction over land matters are similar.

4) That CMCC No.879 of 2010-Thika has progressed very far and is now scheduled for further defence hearing on 4th October 2017 after the Plaintiffs closed their case on 27th January 2017.

5) That this suit is therefore a duplication of the same dispute being determined in CMCC 879 of 2010, and is prejudicial to the 2nd – 17th Defendants who have already prosecuted and closed their case as the Plaintiffs in the said suit.

6) That the suit is not only an embarrassment to the integrity and honour of this court, but also an abuse of the court process.

7) That allowing this suit to proceed would be to entertain the danger of two courts with jurisdiction on land matters reaching diverse decisions on the same issue, a situation that would result to absurdity of court processes.

8) That it is therefore necessary that this suit is stayed awaiting the outcome of CMCC No.879 of 2010-Thika.

In his *Supporting Affidavit*, the 2nd Defendant **Fredrick Nganga Thuo** averred that in the **year 2014**, they learnt of a suit in court between the Plaintiff herein and the Defendants, the 1st Defendant herein as the Plaintiff thereon. That the said suit being **CMCC No.879 of 2010 at Thika** involved the suit properties herein. That having purchased the said plots from the Plaintiff thereon, now the 2nd Defendant in the present suit, they sought to be enjoined in the said suit **CMCC No.879 of 2010**, as the Plaintiffs and the Court allowed the said application on

19th September 2014. It was his averments that they subsequently filed an **Amended Plaintiff** on **3rd November 2014**, and sought for orders or a declaration that they are the legally registered owners of the suit plots which were resultant subdivisions of **Ruiru/Kiu/Block 2/3758**. Further that the Plaintiff herein who is the Defendant in **CMCC No.879 of 2010** filed a Defence and sought for a declaration that **Ruiru/Kiu Block 2/3758** as subdivided into various plots was owned *bonafide* by himself. The Plaintiff herein had also sought for an order that the title deed issued to the 1st Defendant herein in respect of all those subdivided plots be cancelled.

That the said **CMCC No.879 of 2010** is an ongoing suit and is pending further hearing. Therefore it is their surprise that there is a new case in this Court involving the said suit properties. That the order sought in this case are the same ones also sought in **CMCC No.879 of 2010**, Thika as the Plaintiff herein wants **Ruiru/Kiu/Block 2/3758**, declared as his and order that the title be cancelled. He contended that the present case is a duplication of the **CMCC No.879 of 2010-Thika** because it involves the same parties properties and issue. Therefore the present suit is an abuse of the court process since the Plaintiff is praying for the same orders in the two suits. He urged the Court to allow the instant application to avoid a situation where there would be conflicting decisions from two separate courts over the said suit property.

The application is opposed and **Benard Gachie Kamau**, the Plaintiff/Respondent herein filed a **Replying Affidavit** and averred that the suit herein is not a duplication of **CMCC No.879 of 2010**, as only a few parties are appearing in both suits as most of the Defendants in this suit do not appear in **CMCC No.879 of 2010**. That the subject matter of both suits are different in that the current suit is premised on **fraud and illegality** while **CMCC No.879 of 2010** is premised on trespass. He contended that it would be in the best interest of justice that the current matter and **CMCC No.879 of 2010** be consolidated and heard together for the court to have a holistic perspective of the facts pertaining to the case herein. Further that no prejudice will be occasioned to the **2nd - 17th Defendants**, if the two suits are **consolidated** and heard together. It was his contention that **consolidation** of the suits will enable the court to have a comprehensive grasp and perspective of the facts surrounding the two suits and determination of **CMCC No.879 of 2010** will not amount to determination of this suit and hence a stay will not serve any purpose but to delay the case.

It was his further contention that since the Defendants/Applicants have not given sufficient reasons for stay, and the Court has power to allow the consolidation of the two suits, then the Court should order that **CMCC No.879 of 2010**, be consolidated with the present suit and be heard together.

The application was canvassed by way of written submissions. This application is anchored under **Sections 1A & 1B** of the **Civil Procedure Act** which deals with overriding objectives of the Act which is:-

(1A)The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act

Further **Section 1B** of the same Act behoves the court to ensure that it has furthered the achievement of the overriding objective of the Act and it provides:-

(1B) For the purpose of furthering the overriding objective specified in section 1A, the Court shall handle all matters presented before it for the purpose of attaining the following aims—

(a) the just determination of the proceedings;

(b) the efficient disposal of the business of the Court;

(c) the efficient use of the available judicial and administrative resources;

(d) the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and

(e) the use of suitable technology.

The application is also anchored under Section 3A of the same Act which Section donated power to court to issue any orders that are necessary to ensure that end of justice is met and to prevent abuse of the court process.

As the Court embark on the determination of the instant application, it will have in mind the provisions of the above Sections of law.

The Applicants have sought for stay of this suit on allegations that there exist another suit **CMCC No.879 of 2010**, involving the same parties and dealing with the same issues. **Section 6** of the **Civil Procedure Act** provides:-

“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”.

Therefore the above provision of law prevents a trial court from proceeding with any matter which is in issue **directly** or **substantially** in issue in a previously instituted suit or proceedings between the same parties. The main guiding factor is existence of a suit which deals with issues that are directly or substantially in issue in a previous suit or involving same parties.

The bone of contention in both suits herein is **Ruiru/Kiu Block 2/3758**. The Court has looked at the Plaintiff herein and the Plaintiff in **CMCC**

No.879 of 2010 and noted that most of the parties are the same. The prayers sought in this suit are also the prayers sought in **CMCC No.879 of 2010**. The Plaintiff herein has sought for a declaration that he is the *bonafide* proprietor of **Ruiru/Kiu Block 2/3758**. He has also sought for cancellation of the resultant title deeds. These are the same prayers sought in **CMCC No.879 of 2010**. Therefore the Court finds that the matter in issue herein being **Ruiru/Kiu Block 2/3758**, is directly and substantially in issue in **CMCC No.879 of 2010**, which is a previously instituted suit. The parties in this suit are almost the same parties in **CMCC No.879 of 2010**.

Therefore the parties herein and the parties in **CMCC No.879 of 2010** are litigating under the same title. If the two suits are allowed to proceed for hearing in two parallel courts, then there is a possibility of two suits being decided differently by the two different courts.

As provide by **Section 6** of the **Civil Procedure Act**, where there are two separate suits existing in separate courts or where there are parallel proceedings over the similar matter in issue and involving same parties, the Court has discretion to stay such proceedings. However, the said discretion must be exercised judicially. See the case of **Daniel Otieno Awour...Vs...Hardware Trading Stars Ltd & Ano. (2010) eKLR**, where the Court held that

“As I understand the law, whether or not to grant a stay of proceedings or further proceedings in a decree order appealed from is a matter of judicial discretion to be exercised in the interests of justice. Such discretion is unlimited save that by virtue of its character as a judicial discretion it should be exercised rationally and not capriciously or whimsically. 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”.

Therefore this Court has discretion to stay such proceedings and the said discretion is provided for by the law. There is indeed existence of parallel proceedings over **Ruiru/Kiu Block 2/3758**. The Court has discretion to stay such proceedings. The Plaintiff has averred that instead of staying the proceedings, the court should order for consolidation of the two suits. However, it should be noted that **CMCC No.879 of 2010** is an old matter which has been on-going. Ordering for consolidation of the same would prejudice **CMCC No.879 of 2010** as it is now at an advanced stage. By ordering a consolidation, then there will be delay in finalization of **CMCC No.879 of 2010**, and that would go against the spirit of Section 1A & 1B of the Civil Procedure Act. The Court finds that the necessary order to be issued herein is to find that the issues raised by the Plaintiff herein can be adequately delt in **CMCC No.879 of 2010** and there would be no need of consolidating the two suits.

For the above reasons, the Court finds that the Applicants **Notice of Motion** application dated **1st August 2017** is merited. The same is allowed entirely in terms of prayer No.1 with costs being in the cause.

As provided by **Section 6** of the **Civil Procedure Act**, the Court proceeds to order for Stay of this suit and/or proceedings until **CMCC No.879 of 2010** at **Thika Law Courts** is heard and determined.

It is so ordered.

Dated, Signed and Delivered at Thika this 19th day of June 2018.

L. GACHERU

JUDGE

In the presence of

No appearance for Plaintiff/Respondent

Mr. Waweru holding brief for Mr. Gachie for 2nd – 17th Defendants/

Applicants

M/S Kinyua holding brief for Muthomi for 1st, 18th & 24th Defendants/

Applicants

Lucy - Court clerk.

L. GACHERU

JUDGE

19/6/2018