



East Africa Data Centre Limited v Mombasa Wonderpark Limited (Environment & Land Case 225 of 2020) [2024] KEELC 288 (KLR) (30 January 2024) (Ruling)

Neutral citation: [2024] KEELC 288 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 225 OF 2020
NA MATHEKA, J
JANUARY 30, 2024**

BETWEEN

EAST AFRICA DATA CENTRE LIMITED PLAINTIFF

AND

MOMBASA WONDERPARK LIMITED DEFENDANT

RULING

1. The application is dated 26th June 2023 and is brought pursuant to Sections 1A, 1B, 3A and 6 of the Civil Procedure Act Cap 21 Laws of Kenya Order 51 Rule 1 of the Civil Procedure Rules, 2010 and Article 159 of the Constitution of Kenya seeking the following orders;
 1. That the Application herein be certified urgent, service thereof be dispensed with or-d the same be heard ex-parte in the first instance.
 2. That this Honourable court be pleased to grant an order for stay of proceedings herein pending the hearing and determination of this Application.
 3. That this Honourable court be pleased grant an order for Stay of proceedings herein pending hearing and determination of the Petition filed in.
 4. That this Honourable Court be pleased to issue an order for maintenance of status quo of the suit Herein pending hearing and determination of the Petition filed in Mombasa ELC Petition No. 2 of 2023 Mombasa Wonderpark Limited vs Mombasa Parents Club (Nyali Primary School and Kindergarten)
 5. That the costs of this Application be in the cause.
2. It is based on the grounds that this suit relates to a claim that the Defendant misrepresented be Plaintiff that the defendant is the bona fide registered owner and proprietor of the parcel of land. The Plaintiff therefore seeks compensation for damages arising from the alleged breach of



warranties contained in the Sale Agreement entered between the Plaintiff and the Defendant for sale of the suit property to the Plaintiff. On or around 2nd February 2023, the Defendant herein filed a Constitution Petition at the Mombasa Environment and Land Court that is Mombasa ELC Petition No. 2 of 2023 Mombasa WonderPark Limited versus Mombasa Parents Club Nyali Primary School and Kindergarten hereinafter referred to as the Petition. The Petition seeks enforcement of the Defendant' s right to ownership and proprietorship of property as MN/1/10768 and a declaration that the Defendant acquired a good title to be original parcel as against any adverse third-party claims to the same. The Defendant purchased the original parcel from Comen Limited who had been registered as the proprietor of the same following allotment of the original parcel by the Ministry of Water on 1 April 1997 via Part Development Plan (PDP) No. 12.4. CT-47.97. The original parcel was part of Land Reference Number MN/I/10078 which had been excised from a Plot No. MN/1/5543 Which sometimes on 13th July 1990 was allocated to Aldina Visrarn High School vide FR. No.2020/163 measuring 5.810 Hectares. Thereafter in 1996, Plot No. MN/1/5543 which had earlier been allocated to Aldina Visram High School during the sub—division of mother plot LR No. MN/1/1298 was vacated by after alternative land was given elsewhere) was re-planned through NO. 124-CT.47.96 and an authority letter ref 76474/1X dated 4th February 1997 and survey plan F/ R No. 273/43 of 14th February 1997 was issued giving rise to parcels Land Reference numbers MN/ I/10008, MN/1/10069. MN/1/10070, MN/1/10071. MN/I/10072. MN/I/0073, MN/I/10074, MN/1/10075, MN/I/10076, MN/I/10077 and MN/I/10078.

3. The Ministry of Water was then allotted one of the parcels of land, being Land Reference number MN/ I/10078, and caused it to be subdivided further giving rise to the original parcel which was allotted to Cornen Limited on April 1997. The original parcel was then sold to the Defendant herein and the Defendant caused it to be sub-divided Further into three parcels namely. MN/I/16701, MN/I/16702 and MN/I/16703 underwent changer of user and subsequently registered in favour of the Defendant as 20431/I/MN. 20432/1/MN and the suit property. Thereafter, the Defendant sold and transferred parcel of land 20432/1/MN to Petrol Oil Kenya Limited and the suit property to the Plaintiff herein. To date, the sale of parcel of land 20432/1/MN to Petrol Oil Kenya Limited has not been challenged and the purchasers continue quiet and peaceful enjoyment of the 20432/1/MN devoid of any adverse claims. There are various petitions filed by the owners of parcels of land adjoining the original parcel which seek cancellation of parallel title deeds issued in respect of their parcels Land Reference numbers MN/1/0069, MN/1/10071, MN/1/10072, MN/1/10076 and MN/1/10077 that is Mombasa ELC Petition No. 24, 30, 31 and 32 all of 2022.
4. The outcome of the suit herein is therefore predicated on the outcome of the Petition and Petitions filed by owners of the parcels of land adjoining the original parcel since the Petition filed by the Defendant will ultimately determine whether the Defendant, acquired a good title to the original parcel which was excised from Land Reference number M N/1/10076 which originally allotted to Cornen Limited. The Defendant is confident that the Petition will be determined in their favour and ascertain the Defendant's right to absolute ownership and proprietorship of the original parcel which will consequently allay the Plaintiff s of misrepresentation filed in the suit herein- This will lead to amicable settlement of the suit herein between the and the Defendant through recoding of a consent to compromise suit. There is eminent threat that judgment in the herein will rendered before determination of the Petition thereby occasioning prejudice to the Defendant which can be averted by allowing the prayers sought herein. There is a pending risk that separate judgment will be rendered in respect of the same subject matter. The Defendant has moved with speed to make this Application seeking orders for stay of the proceedings relating to hearing of the main suit herein pending determination of the Petition filed by the Defendant. An out of court settlement of the dispute between the Plaintiff and the Defendant herein is the best possible outcome that can be achieved.



5. The Respondent submitted that the Plaintiff's suit against the Defendant is a contractual claim for breach of warranty of a contract on account of the Defendant's breach of clause 13 of the sale agreement. That the determination of the Petition will not in any way affect this suit. That a stay of the current proceedings will prejudice the quick resolution of the Plaintiff's case.
6. I have carefully considered the instant application and the rival submissions by the parties. The application for stay of proceedings in this matter pending the hearing and determination of Mombasa ELC Petition No. 2 of 2023 Mombasa Wonderpark Limited vs Mombasa Parents Club (Nyalı Primary School and Kindergarten). Stay of proceedings for whatever reason is a grave judicial action which seriously interferes with the right of a litigant to conduct his litigation. It impinges on right of access to justice, right to be heard without delay and overall, right to fair trial. Therefore, the test for stay of proceeding is very strict. In the case of *Global Tours & Travels Limited; Nairobi HC Winding up Cause No. 43 of 2000* the court stated that;

"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"

7. Stay of proceedings has been discussed in the following passages in *Halsbury's Law of England*, 4th Edition. Vol. 37 page 330 and 332, that;

"The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the court's general practice is that a stay of proceedings should not be imposed unless the proceeding beyond all reasonable doubt ought not to be allowed to continue."

"This is a power which, it has been emphasized, ought to be exercised sparingly, and only in exceptional cases."

8. In the instant case the applicant states that they filed a Petition filed in Mombasa ELC Petition No. 2 of 2023 Mombasa Wonderpark Limited vs Mombasa Parents Club (Nyalı Primary School and Kindergarten). On or around 2nd February 2023, the Defendant herein files a Constitution Petition at the Mombasa Environment and Land Court that is Mombasa ELC Petition No. 2 of 2023 Mombasa WonderPark Limited versus Mombasa Parents Club Nyalı Primary School and Kindergarten hereinafter referred to as the Petition. The Petition seeks enforcement of the Defendant's right to ownership and proprietorship of property as MN/1/10768 (hereinafter the original parcel) and a declaration that the Defendant acquired a good title to be original parcel as against any adverse third-party claims to the same. The Defendant purchased the original parcel from Comen Limited who had been registered as the proprietor of the same. That this suit relates to a claim that the Defendant misrepresented to the Plaintiff that the defendant is the bona fide registered owner and proprietor of the parcel of land. The Plaintiff therefore seeks compensation for damages arising from the alleged breach of warranties contained in the Sale Agreement entered between the Plaintiff and the Defendant



for sale of the suit property to the Plaintiff. That this suit should be stayed pending the outcome of the said Petition. The Respondent opposes the application stating that the Plaintiff's suit against the Defendant is a contractual claim for breach of warranty of a contract on account of the Defendant's breach of clause 13 of the sale agreement.

9. It is my finding that it would be unfair for the Applicants to be granted a stay of proceedings for several reasons. Firstly, the Respondent is not a party to the said Petition and their claim is based on a breach of contract. Secondly the Applicant herein filed a Constitution Petition at the Mombasa Environment and Land Court that is Mombasa ELC Petition No. 2 of 2023 Mombasa Wonder Park Limited versus Mombasa Parents Club Nyalı Primary School and Kindergarten in 2023 way after this suit was filed in 2020. The Petition according to the Applicant seeks enforcement of the Defendant's right to ownership and proprietorship of property as MN/1/10768 (hereinafter the original parcel) and a declaration that the Defendant acquired a good title to be original parcel as against any adverse third-party claims to the same. I find the cause of action in this suit is different and based on the law of contract.
10. The provisions of *Article 159(2)(a)(b)(c) and (d) of the Constitution of Kenya* as read with *Sections 1A and 1B of the Civil Procedure Act, Cap 21* enjoin this court to foster and facilitate the overriding objective of the Act to render justice to parties in all Civil
11. Proceedings in a just, expeditious, proportionate and affordable cost to parties. In the instant case, it is my considered opinion that it would not be in the interest of justice to exercise court's discretion and grant stay of proceedings as the same will only serve the purpose of delaying this suit. I find that the application is not merited and I dismiss it with costs.
12. It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 30TH DAY OF JANUARY 2024.

N.A. MATHEKA

JUDGE

