



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT GARISSA

ELC CASE NO. 30 OF 2017

(FORMERLY NO. 77 OF 2017, EMBU)

**SAHARA AHMED HILLOW (Suing as administrator ad litem of the Estate
of the late Ahmed Hillow Osman (Deceased)).....PLAINTIFF**

VERSUS

MOHAMED HASSAN JILLO.....1ST DEFENDANT

MUKTAR HASSAN JILLO..... 2ND DEFENDANT

ALI HASSAN JILLO..... 3RD DEFENDANT

RULING

INTRODUCTION

The dispute between the applicant and the respondent was formerly filed in Embu as ELC No. 77/2017 simultaneously with a Notice of Motion under certificate of urgency dated 19th April, 2017. That case was subsequently transferred to the ELC herein in Garissa for hearing and determination. When the matter came up for hearing on 19th April, 2018, the defendant/applicant filed the present application seeking orders that the proceedings be stayed and that the dispute be referred to the local community elders for resolution. The plaintiff responded to the said application by way of a replying affidavit sworn on 25th April, 2018.

DEFENDANTS/APPLICANTS POSITION

The applicant contends that the crux of the suit filed by the plaintiff/respondent is with regard to a boundary dispute over farms 23 and 24 which are adjacent to each other and situate in Nalka punda area Mandera County, both farms unregistered and classifiable as unregistered community land.

The applicant further averred that prior to the filing of this case, all the parties had agreed to refer the matter to Alternative Dispute Resolution process at the local community elders level where they even nominated their own representatives in the panel of elders tasked with hearing the dispute and finding a solution to the long standing boundary dispute between their respective families. He attached copies of minutes of mediation conferences by the alleged elders marked MJH1.

The applicant further contends that the decision to refer the dispute to mediation by elders was reached by consensus whereby an agreement was drawn and executed between members of the plaintiffs and defendants respective families undertaking to adhere to the local elders decision. The alleged ADR process commenced around 2016 and was graced by the attendance of the area Chief, Assistant Chief and Deputy County Commissioner, Mandera County.

By March 2017, the plaintiff/respondent unilaterally chose to abandon the process and moved to court. The applicant further states that the premise upon which parties agreed to let elders determine the demarcation of their respective plots was that the locality within which the parties farms are located is unsurveyed, and as such, only members of the community familiar with the area could identify where each party's property extended to. The applicant also deposed that the issue of mediation is evidenced by a letter issued to the plaintiffs herein by the County Land Management Board annexed thereto and marked "MJH 3".

PLAINTIFFS/RESPONDENTS POSITION

In a replying affidavit sworn on 25th April 2018, the plaintiff/respondent stated that the application for stay of the proceedings herein is

unfounded, misconceived and calculated to delay the hearing and determination of this suit. The plaintiff/respondent also deposed that this court is seized with the requisite jurisdiction to hear and determine this suit as provided for under Article 162 (2) (b) of the Constitution of Kenya, 2010 as read with Section 13 of the ELC Act and Section 42 of the Community Land Act. The plaintiff/respondent also deposed that the parties in dispute had given priority to mediation by elders which failed to reach any resolution for over a decade now. The respondent further deposed that the dispute that existed was in respect of boundaries between the two properties but the dispute has now taken a new dimension when the applicants took the law into their own hands and started threatening them, hived off large portion of their property and destroyed crops. The respondent further argued that unlike the applicants, the respondents do carry on meaningful farming for their livelihood and that their farm which was hived off remain unutilized and is lying idle which is economically detrimental to their family.

DECISION

The defendants/applicants in this case are seeking a stay of the proceeding and an order referring the dispute herein to the local community elders for purposes of conclusion of the process of Alternative Dispute Resolution previously ongoing before filing of the plaintiff's suit. That application is brought under Article 159 (2) (c) of the Constitution of Kenya, 2010 Section 39 (3) of the Community Lands Act No. 27 of 2017 Sections 1A (1) (2), 1B (1) and 3A CPA and Order 51 Rule 1 CPR.

Under Article 159 (2) (c) the courts and tribunals are to be guided by principles such as Alternative Dispute Resolution mechanism, mediation reconciliation, arbitration and traditional dispute resolution as a means of bringing cohesion and co-existence amongst the people. However, those principles can only be promoted where parties have consented and are willing to be bound by the decision of the decision makers. In this case, the parties had initially agreed to refer the dispute to a panel of elders but the plaintiff later abandoned the process and elected to bring the dispute for resolution to this court.

When the parties initially referred the dispute to the mediation process, there was no law which regulated such referral which makes them to be bound by such a process and decision. The agreement by the parties to refer the dispute for mediation was a gentleman's agreement. Since the parties had mutually agreed to refer their dispute to mediation initially, there was no by laws or any enforcement mechanism to ensure a party remains in that mediation process or be bound by its decision once made. In my view, the applicant has not cited any law which empowers this court to stay these proceedings and compel the respondents to continue with the mediation process which he abandoned midway before involving this court.

An order for stay of proceedings is a discretionary power given to the courts to be exercised judicially. If the overriding objective of staying these proceeding is to facilitate just expeditious proportionate and affordable resolution of the dispute, then this court will not hesitate to do so. From the pleadings and submissions by the parties, staying these proceedings will delay rather than fast track the resolution of the dispute herein. Since the court cannot compel parties to go for mediation where one party has since withdrawn from such mediation half way, this court finds the application dated 17th April 2018 lacking merit and the same is hereby dismissed with costs to be in the cause.

It is so ordered.

Read, Delivered and Signed in the open court this 26th day of July, 2018.

Hon. Justice E. C. Cheron

ELC JUDGE

In the presence of:

(1) Mohammud Advocate for the plaintiff

(2) Plaintiff