



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO.99 OF 2015

AGNES MUMBANU KINAKO.....PLAINTIFF

VERSUS

THE ATTORNEY GENERAL.....1ST DEFENDANT

DISTRICT LANDS REGISTRAR KITUI.....2ND DEFENDANT

TIMOTHY MUIMI MUTEMI.....3RD DEFENDANT

ERIC JOHN MUTEMI.....4TH DEFENDANT

DOUGLAS KYALO MUTEMI.....5TH DEFENDANT

DATER ENTERPRISES LIMITED.....6TH DEFENDANT

RULING

1. In the Notice of Motion dated 17th November, 2017, the 3rd, 4th, 5th and 6th Defendants (*the Defendants*) are seeking for an order staying these proceedings pending the hearing and determination of the Appeal.
2. The Application is premised on the grounds that the Defendants have filed an Appeal against the Ruling of this court dated 22nd September, 2017; that the Appeal has overwhelming chances of success and that if the order of stay of proceedings is not granted, the Appeal will be rendered nugatory.
3. According to the Defendants, the Plaintiff's suit was filed out of time; that the Plaintiff's suit offends the provision of Order 3 Rule 7 of the Civil Procedure Rules and that the Defendants have a right to lodge an Appeal against the Ruling of the court.
4. In response, the Plaintiff deponed that the time for filing an Appeal has since lapsed; that the Applicants are out to frustrate timely prosecution of this matter and that the instant Application is an abuse of the process of the court and should be dismissed.
5. The Defendants' advocate did not file written submissions but relied on her client's Affidavit. The Plaintiff's advocate submitted that the Defendants have not established that they will suffer substantial loss if the order is not made; that there was unreasonable delay in the filing of the Application and that no security for the due performance of the decree has been given.
6. In their Application dated 13th December, 2016, the Defendants/Applicants sought for an order striking out the suit on the grounds that the Plaintiff lacks the capacity to institute the suit on behalf of the Estate of the late Paul Mutemi Kamwaki; that the suit is statutorily time barred and that the suit offends the general rules of pleadings due to the multiple causes of action.
7. In its Ruling of 22nd September, 2017, this court dismissed with costs the said Application. The Defendants have since filed a Notice of Appeal against that Ruling and are seeking for a stay of proceedings pending the hearing of the Appeal. The Application has been filed pursuant to the provisions of Order 42 Rule 6 of the Civil Procedure Rules. Order 42 Rule 6(1) and (2) of the Civil Procedure Rules provides as follows:

“6. (1) No Appeal or second Appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the Application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on Application being made, to consider such

Application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the Appeal is preferred may apply to the appellate court to have such order set aside.

(2) No order for stay of execution shall be made under sub rule (1) unless—

(a) the court is satisfied that substantial loss may result to the Applicant unless the order is made and that the Application has been made without unreasonable delay; and

(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the Applicant.”

8. The Defendants have not shown by way of Affidavit evidence the substantial loss or prejudice that they shall suffer if the order of stay of proceedings is not granted. Although the Defendants have argued that the Appeal shall be rendered nugatory if the order sought is not granted, they have not shown how the Appeal shall be rendered nugatory.

9. Indeed, it is trite that the Appeal against the Ruling of this court can proceed alongside the hearing of the suit in this court. In the event the Appeal succeeds, the suit shall be terminated at whatever stage it would have reached. In the event the suit is concluded before the Appeal is heard and determined, the Defendants will still have an opportunity to raise the same arguments in the Court of Appeal, either in respect of the final Judgment or only in respect to the Ruling.

10. Having failed to show the substantial loss that they will suffer, I decline to grant the orders sought.

11. For those reasons, I dismiss the Application dated 17th November, 2017 with costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 21ST DAY OF SEPTEMBER, 2018.

O.A. ANGOTE

JUDGE