



REPUBLIC OF KENYA
IN THE LAND AND ENVIRONMENT COURT

AT MALINDI

ELC 163 OF 2013

JULIUS MKAUMA TSUMA.....PLAINTIFF

VERSUS

JUMA MOHAMED MAGONGO.....DEFENDANT

RULING

1. Before me is an application dated 25th November 2016 but filed in Court on 7th February 2017. The application brought by the Defendant under sections 1A, 1B and 3A of the Civil Procedure Act prays for orders:

1. (SPENT).

2. THAT pending the hearing and determination of this suit there be stay of proceedings in this case.

3. THAT there be stay of proceedings in this suit pending the final hearing and determination of the application for revocation of grant filed by the defendant in **MOMBASA HIGH COURT SUCCESSION NUMBER 216 OF 2010.**

4. THAT the costs of this application be provided for.

2. The application is supported by an affidavit of the 1st defendant Juma Mohamed Magongo sworn on 25th November 2016. It is the 1st Defendant/Applicant's case that he has on the same day 25th November 2016 filed an application for revocation of grant in Mombasa High Court Succession Cause No. 216 of 2010 seeking to have the letters of administration made in favor of the plaintiff revoked. The 1st Defendant's main reason of seeking the revocation of the grant is the fact that the plaintiff herein "intentionally ignored to inform the Mombasa Court That the 1st Defendant still had interest over land parcel No. Mugumo Pasta/Mazeraz /135. It is the 1st defendant's case that unless the orders sought are granted, then the plaintiff who has already testified herein and closed his case is likely to benefit out of misleading the court.

3. The plaintiff Julius Mkauma Tsama opposes the application In a Replying Affidavit sworn on 15th February 2017, and filed herein on 16th February, 2017, the Plaintiff contends that this application is vexatious and amounts to an abuse of the court process. The Plaintiff/respondent avers that the suit herein was filed and served upon the defendant/ applicant in the year 2013 and since then the defendant was

aware of the existence of the proceedings filed in various courts but had never raised them. It is the plaintiff's case that this application is solely meant to frustrate and delay the conclusion of the case.

I have carefully considered the application and the response thereto. I have also perused the rival submissions filed by the learned Advocates representing both the applicant and the Respondent. It is evident from the provisions cited that the applicant seeks benefit from the inherent discretionary powers of this court to do justice to have the proceedings herein stayed.

5. I have looked at the records of this court and the pleadings filed herein. It is apparent from the pleadings filed in the year 2013 that the plaintiff indicated that he was buying this suit as an Administrator of the Estate of the late Tsama Mkuzi Saha. At paragraphs 8 and 9 of the plaint, the plaintiff accuses the defendant of placing a restriction on the suit land without any lawful basis and thereby restricting the plaintiff's use of the land. In response thereto, the defendant at paragraphs 7 of the Statement of Defence filed on 21st May 2014 states as follows:

“In reply to paragraph 9 of the plaint, the 1st Defendant avers that the plaintiff is not entitled to make any dealing with the land known as Mgumo Pasta/ Mazeras/135 as the same does not belong to the deceased.”

6. A party is bound in a case like this by his pleadings and going by the statement at paragraph 7 of the Defence, it is not easy to see how a revocation of the grant aforesaid shall be helpful to the 1st defendant in this regard.

7. I have perused the record herein and it is evident that the 1st defendant is reluctant to have this trial concluded. I note for instance that this, matter came for hearing before the Hon. Justice Angote on 3rd November 2016 when the defendant's application for adjournment was rejected. The matter then proceeded and the plaintiff closed his case after calling two witnesses. On 28th November 2016, when the matter came up for submissions, counsel for the defendant applied once again for an adjournment on the basis that he had just been served with the plaintiff's submission and requested for a mention date. The same was allowed and the Honourable Judge fixed the matter for mention on 16/2/2017. Before the said date, the defendant/applicant moved to court on 7/2/2017 and filed this application.

8. Having considered the issues raised herein, I am inclined to agree with the plaintiff/respondent that this application is nothing but an abuse of this Court's process. The same is dismissed with costs to the plaintiff/respondent.

Dated, signed and delivered in Malindi this 12th day of May, 2017.

J.O. OLOLA

JUDGE