



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT OF KENYA
AT EMBU
E.L.C. CASE NO. 221 OF 2014
FORMERLY MERU CIVIL CASE NO. 20 OF 1995
IRERI NDWIGA.....PLAINTIFF
VERSUS
BEDAN IRERI M'MITI.....DEFENDANT
RULING

1. By a notice of motion dated 26th July 2017 filed under certificate of urgency, the Defendant sought the following orders;

a. That there be a stay of any further proceedings in this suit pending the hearing and determination of this application.

b. That there be a stay of any further proceedings in this suit pending the hearing and determination of Embu Criminal Case No. 1515 of 2015.

c. That the costs of this application be provided for.

2. The grounds of the said applications were stated on the face of the motion. In summary, it was stated that if this suit were to proceed the Defendant would suffer prejudice in the pending criminal case in that his constitutional right of presumption of innocence may be lost. It was stated that the facts, evidence and witnesses in the civil and criminal cases were similar and if the Defendant was to file a further amended defence herein, it would violate his right to remain silent with respect to the criminal trial.

3. The said application was supported by an affidavit sworn by the Defendant on 26th July 2017 in which he reiterated the grounds set out in his notice of motion. He swore that the Plaintiff in this suit is the complainant in the criminal case where he is the accused person. He was apprehensive that if he filed his amended defence before conclusion of the criminal case, then he might disclose his line of defence to the prosecution. The Defendant, therefore, urged the court to stay the instant civil suit pending conclusion of the criminal case.

4. The said application was opposed by the Plaintiff who filed a replying affidavit sworn on 28th September 2017. The Plaintiff stated that the civil dispute herein was first taken to court in Embu RMCC No. 17 of 1987 and has remained unresolved over the years. He stated that there was nothing wrong in the civil and criminal proceedings proceeding concurrently. He further stated that the instant application,

if allowed, would violate his constitutional right under **Article 50(1) of the Constitution of Kenya**. He viewed the instant application as a delaying tactic and urged the court to dismiss the same.

5. The court has perused the Defendant's said notice of motion and noted that it was brought under the provisions of **section 1A, 1B and section 3A of the Civil Procedure Act**. Those are the general provisions which articulate the overriding objective of the Civil Procedure Act and Rules and which preserve the inherent power of the court to make any orders for the purpose of meeting the ends of justice or preventing abuse of the court process.

6. The court has also noted that the Defendant, although alleging that the prosecution of the civil suit would violate his fundamental rights, has not invoked the relevant provisions of the Constitution but has chosen to rely upon the general provisions of the **Civil Procedure Act (Cap 21) and the Civil Procedure Rules, 2010**.

7. The court was also not informed whether the Defendant had filed any constitutional petition for appropriate relief regarding his apprehension that his constitutional rights are likely to be violated by the continued prosecution of the instant suit.

8. The court has further noted from the court file that on 13th April 2017, the Plaintiff was granted leave to amend his plaint within 14 days with corresponding leave to the Defendant to similarly amend his defence within 14 days, if necessary. The parties were then granted 60 days to comply with **Order 11 Civil Procedure Rules** in preparation for trial of the main suit.

9. When the suit was mentioned next on 21st June 2017, the Defendant requested for more time to file his amended defence. The court granted him an extension of 14 more days to file an amended defence and fixed the suit for hearing on 21st September 2017. There was no mention that the Defendant could not file his amended defence because of the pending criminal case.

10. When the suit was listed for hearing on 21st September 2017, the Defendant's advocate did not attend court although the Defendant was present in person. The Defendant informed the court that his advocate had telephoned the Plaintiff's advocate on the matter. The suit was consequently adjourned and the Defendant was condemned to pay court adjournment fee.

11. It is also clear from the record that the Defendant did not file any amended defence even upon extension of time on 21st June 2017 with the consequence that the Defendant is deemed to be relying on his earlier pleading.

12. The main question for determination in this application is whether or not the Defendant has made out case for stay of civil proceedings arising out of the same transaction or series of transactions. The Defendant did not refer the court to any authorities in which a court has granted a stay of civil proceedings in similar circumstances.

13. It is well established that criminal proceedings are instituted by the republic for the purpose of punishing a criminal offender. They are proceedings undertaken by the state in the public interest and for the good of society at large. They belong to the realm of public law. However, it is also well settled that a private citizen who is aggrieved by the conduct of such a suspect may also exercise his legal rights in private law and undertake civil proceedings for a civil remedy arising out of the same transaction or series of transactions in respect of which the state instituted criminal proceedings. There would be nothing wrong with such parallel proceedings since they are each intended to achieve different objectives. It is not permissible, however, for the state to employ the criminal justice system for the purpose of resolving a purely civil dispute.

14. The Defendant's contention is that if he were to file his amended defence, then his constitutional right to remain silent under Article 50 of the Constitution of Kenya would be violated. In my opinion, there is a big difference between a pleading and evidence as defined in the **Evidence Act (Cap 80)**. So how

would a mere pleading in a civil case violate the Defendant's right to remain silent in a separate criminal proceeding? It was not demonstrated by the Defendant how such a violation would arise. It was also not demonstrated how an amended pleading in a pending civil case would be tendered in evidence in the criminal case and what impact or prejudice it may cause.

15. It was also suggested that by filing an amended defence herein, the Defendant may end up disclosing his line of defence to the prosecution. In my opinion, this suggestion is merely speculative. The prosecution had not closed its case at the time the instant application for stay was filed. It would be speculative for the Defendant to assume that he will be put on his defence. What if the criminal court were to find that he has no case to answer under ***section 210 of the Criminal Procedure Code (Cap 75)?*** And how would an amended defence disclose to the prosecution his line of defence when the prosecution is not a party to the civil suit?

16. In a nutshell, the court is not satisfied that the Defendant has made out a case for stay of a civil suit filed in 1995 or thereabouts on account of the pendency of a criminal case which was commenced in 2015. In my view, the Defendant has failed to demonstrate that the continued prosecution of the civil suit would violate his constitutional rights under the Constitution of Kenya. The Plaintiff is entitled as much as the Defendant to an expeditious and fair trial under Article 50 of the Constitution of Kenya. It is also my view that granting a stay of proceedings herein would run counter to the overriding objective of dispensing justice in an expeditious, proportionate and affordable manner as required under the Civil Procedure Act (Cap 21).

17. The upshot of the foregoing is that the court finds no merit in the Defendant's notice of motion dated 26th July 2017 and the same is hereby dismissed with costs to the Plaintiff.

18. The court shall give directions on the hearing of this suit and fix a hearing date at the time of delivery of this ruling.

19. Orders accordingly.

RULING DATED, SIGNED and DELIVERED in open court at **EMBU** this **2nd** day of **NOVEMBER, 2017**

In the presence of Mr Njoroge holding brief for Ms Beth Ndorongo for the Plaintiff and the Defendant in person.

Court clerk Njue/Leadys

Y.M. ANGIMA

JUDGE

02.11.17