



REPUBLIC OF KENYA



KENYA LAW
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**Kiruwa & another v Weindaba & 7 others (Environment & Land Case
169 of 2021) [2024] KEELC 4154 (KLR) (26 March 2024) (Ruling)**

Neutral citation: [2024] KEELC 4154 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
ENVIRONMENT & LAND CASE 169 OF 2021**

AE DENA, J

MARCH 26, 2024

BETWEEN

KOMBO KOPA KIRUWA 1ST PLAINTIFF

OMARI BAKARI KITAURO 2ND PLAINTIFF

AND

JAMES MUTELE WEINDABA 1ST DEFENDANT

SAHARE KISUPI MWICHAMBE 2ND DEFENDANT

WILLIE MAHUNGU NDABI 3RD DEFENDANT

DAVID WAGURA MATHAI 4TH DEFENDANT

LAND REGISTRAR, KWALE LAND REGISTRY 5TH DEFENDANT

NDOVU ROCK LIMITED 6TH DEFENDANT

LAND REGISTRAR, MOMBASA LAND REGISTRY 7TH DEFENDANT

THE HONOURABLE ATTORNEY GENERAL 8TH DEFENDANT

RULING

1. The 2nd Defendant during the pendency of these proceedings filed an application dated 22/5/23 seeking the following orders: -
 1. Spent
 2. That the Honourable be and is hereby pleased to issue and/or directing that the orders/ Directions issued by the court on the 15th March 2023 are suspended or varied/set aside in that the suit will not proceed for further hearing/direction/order pending the hearing and determination of the instant application.



3. That the Honourable be and is hereby pleased to issue an order directing that the suit herein will only proceed upon conclusion of;
 - i. ELC No. E004/2022 (Mombasa) of Ndovu Rocks Ltd Vs. James Mutele Weindaba & Others.
 - ii. Upon conclusion of the Pending sale transaction between the Applicant- herein and the 6th Defendant by paying the balance of the purchase price accordingly.
 4. That the Honourable court be pleased to order in the alternative that failure by the 6th Defendant/Respondent to comply as provided under clause (c) herein by paying the balance of the purchase price that it has no legal/beneficial claim/interest of the portion of property of the land belonging to the Applicant herein.
 5. That the Honourable court be pleased to issue any other order(s) it may deem fit in the circumstances.
 6. Costs be provided.
2. The application is premised on the ground that currently the 6th Defendant is the current registered owner of the suit property. That the suit property is the same and a decision in either mater will have adverse effect. That the 6th Defendant breached the terms of the sale agreement by failing to pay the balance of the purchase price to the 2nd Defendant yet he has proceeded to file the proceedings in Mombasa above claiming full proprietorship. That the parties are bound by the terms of their agreement and the 6th Defendant cannot escape his obligations.
 3. The application is also supported by the Affidavit sworn by SAHARE KISUPI MWICHAMBE and reiterates the above grounds. It was deponed that the there was an impending mention on 24/5/23 before my brother Justice L.P. Naikuni. A copy of the search was also annexed. The notice was attached. It is further stated that the court in the present proceedings had issued direction for parties to file their final submissions by 23/5/23 with a view to fixing the matter for judgement. That the 6th Defendant Respondent had failed to attend a site visit for all the parties as directed by the court yet the orders were sought at their instance.
 4. The application was opposed by the 6th Defendant through the affidavit sworn by RAKESH KUMAR BVATS ON 20/7/23. It is deponed that the proceedings in Mombasa were withdrawn vide a notice dated 30/5/23 and the application herein is moot. The said notice was attached. It is deponed that the sale agreement and its terms was not the basis of the proceedings in the present suit. That the 2nd Defendant all along knew of the existence of the proceedings in Mombasa and took the option of proceeding with the hearing to the point of filing submissions. That both the Plaintiff and the 6th Defendant were eager to know their fate.
 5. The Plaintiff filed grounds of opposition on 24/07/23 stating that the Plaintiffs in the present proceedings were not parties to the suit filed in Mombasa. That the Applicant had not established any nexus between the proceedings in Mombasa and the present proceedings before the Kwale ELC. That the said application was overtaken by events by dint of a Notice of Withdrawal of ELC NO. E004/2022 (Mombasa) of Ndovu Rocks Ltd Vs. James Mutele Weindaba & Others. That there was no basis in law to for the stay of the proceedings awaiting the conclusion of the pending sale transaction.
 6. I gave directions that the application be dispensed by way of written submissions. The Applicant filed their submissions dated 21/09/23 on 22/09/23 and which reiterate the grounds upon which the application is premised. That the parties are bound by the terms of their agreement and the 6th



Defendant cannot escape his obligations. That the decision rendered in the present matter might have adverse effects upon the 2nd Defendant/Applicant if the stay of these proceedings is not granted. The Applicant prays that the application be allowed.

7. The Plaintiffs submissions were filed on 24/7/23. It is submitted the test to determine whether stay of proceedings should be granted is high and stringent. That the court should weight whether it is in the interest of justice for such orders to be granted. The suit in Mombasa was withdrawn by the 6th Defendant who had the right to exercise his right to withdraw the same. That the application has been overtaken by events. That the Plaintiffs in the present suit were not parties in the suit filed in Mombasa. The Applicant had not presented the proceedings filed in Mombasa to enable the court establish the nexus. That none of the Defendants had disclosed the existence of the suit filed in Mombasa and had all along agitated for the matter to proceed. Citing articles 10, 47 and 50 it was submitted that the Plaintiffs were entitled to a speedy trial. The 2nd Defendant had not demonstrated the prejudice to be suffered if the court were to proceed to deliver the Judgement.

Determination

8. As a background, the main proceedings in this suit proceeded for further hearing on 26/01/23 and 27/01/23 and all the parties closed their cases. The court issued directions on the filing of submissions with each side given 21 days. At the same time I allowed an application for a site visit at the instance of Mr. Ayisi for counsels to appreciate the ground status. Counsel for the 2nd Defendant intimated there were emerging issues which required to be resolved between his client and the 6th Defendant which I directed should be resolved within the 21 days extension I had issued for parties to finalize their submissions. On 23/05/23 the 2nd Defendant filed an application dated 22/5/23 under Certificate of Urgency seeking to stay the delivery of Judgement in this matter. I declined to certify the same as urgent for the reason that the court was giving Judgements dates in September/October 2023. However, there being a pending interlocutory matter the court gave directions on disposal thereof and vacated the date for Judgement. On 11/10/23 the court scheduled the matter for both the ruling and the Judgement on 15/2/2024.
9. The application has been brought under the provisions of order 40 of the Civil Procedure Rules and Sections 1A, 1B, 2, 3A, 63 of the Civil Procedure Act. Order 40 is on temporary injunctions, Rule 2 thereof is on injunction to restrain breach of contract. The application raises allegations of breach of contract but from my review I do not think it is supported by the pleadings in the present case within which it is filed. The subject of the proceedings before me are not based on breach of the sale agreement.
10. But having stated the above having considered the grounds and the proceeding in the suit before me, the main issue for determination is whether the present proceedings should be stayed. I have seen the rest of the provisions under which the application is brought.
11. In the case of Kenya Wildlife Service Vs James Mutembei (2019) eKLR the learned judge had this to say about stay of proceedings

Stay of proceedings should not be confused with stay of execution pending appeal. Stay of proceedings 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 high and stringent”.



12. In Global Tours & Travel Limited Nairobi HC Winding up cause no 43 of 2000 it was stated that stay of proceedings should not be imposed unless the proceeding beyond reasonable doubt ought not to be allowed to continue.
13. I note that before the application was filed the suit in Mombasa had already been lodged as from the citation it appears to have been filed in the year 2022. The hearings in this matter took place way after the said proceedings were commenced. From the citation the suit pits the 6th Defendant and the 2nd Defendants. There is no explanation why it took the Applicant this long to bring the matter to the attention of the court and why no step was taken to amend the pleadings herein to incorporate the Applicants claim. Instead the Applicant chose to go through the entire motion of hearing the case. I do not think the application was brought in good faith.
14. Moreover the pleadings filed in court were not availed to this court a fact which I noted at the outset and brought to the attention of the applicant. Todate, the said proceedings have never been availed. The court is left to grapple on the content thereof with no material upon which this court can review and facilitate its determination. As such it is my finding that the Applicant has failed to demonstrate to the court beyond reasonable doubt that the proceedings herein and specifically the delivery of Judgement ought not to be allowed to continue.
15. Guided on the case law above I see no basis or justification for allowing the orders sought in the application dated 22/5/23. To do so will be to delay this matter further contrary to the very objectives of sections 1A and 1B of the Civil Procedure Act on expeditious disposal of cases.
16. The upshot of the foregoing is that the application is dismissed and costs shall be in the cause.

RULING DATED SIGNED AND DELIVERED THIS 26TH DAY OF MARCH 2024.

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A.E DENA

JUDGE

Ruling delivered virtually through Microsoft teams Video Conferencing Platform in the presence of:

Mr. Mwanzia for the Plaintiffs

Mr. Kibet for the 1st Defendant

Mr. Shimaka for the 2nd Defendant

Mr. Otieno holding brief for Mr. Kibet and Orluenjo for the 3rd & 4th Defendant

Mr. Otieno Achola Mr. Ayisi for the 6th Defendant

Mr. Mwanjeje for the 5th, 7th and 8th Defendants

Mr. Daniel Disii – Court Assistant

