



Wakufwa & 40 others (Suing on their own Behalf and on Behalf of 37 others) v Maru (Environmental and Land Originating Summons 81 of 2016) [2025] KEELC 860 (KLR) (27 February 2025) (Ruling)

Neutral citation: [2025] KEELC 860 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIROMENTAL AND LAND ORIGINATING SUMMONS 81 OF 2016
YM ANGIMA, J
FEBRUARY 27, 2025**

BETWEEN

**FRANK NYAMBU WAKUFWA 1ST PLAINTIFF
MUSA JUMA SHOGHOSHO 2ND PLAINTIFF
JIMMY K MONGO 3RD PLAINTIFF
GEORGE GAMBA ZOMBO & 37 OTHERS & 37 OTHERS & 37 OTHERS & 37
OTHERS & 37 OTHERS & 37 OTHERS & 37 OTHERS 4TH PLAINTIFF
SUING ON THEIR OWN BEHALF AND ON BEHALF OF 37 OTHERS**

AND

BHARRABALA RAJENDRA KUMAR MARU DEFENDANT

RULING

A. Defendant's application

1. The defendant filed a notice of motion dated 26.7.2024 pursuant to Order 25 rules 1 and 4, Order 40 rule 1 of the *Civil Procedure Rules* (the Rules), Sections 3A and 27 (1) of the *Civil Procedure Act* (Cap 21) and any other enabling provisions of the law seeking a stay of the suit in respect of 3 out of the 37 plaintiffs until they settle costs of Kshs. 321,960 awarded against them in a previous suit against the defendant.
2. The application was based upon the grounds set out on the face of the motion and the contents of the supporting affidavit sworn by Paresh Jarantilal Maru on 26.07.2024. It was stated that Frank Nyambu, Jimmy Mongo and Richard Atetwe were among the plaintiffs who had sued the defendant in *Mombasa HCCC No. 23 of 2015* (the previous suit) over the suit property being Plot No.413/I/



MN. It was further stated that when they withdrew the said suit they were condemned to pay costs which were eventually taxed at Kshs. 321,960/=.

3. The defendant contended that the plaintiffs had filed a similar suit over the same cause of action and over the same property without having settled the costs of the Kshs. 321,960/= due from them. As a result, the defendant wanted the suit against the 3 named plaintiffs to be stayed until the costs in the previous suit are paid.

B. Plaintiffs' response

4. The plaintiffs filed grounds of opposition dated 14.10.2024 in opposition to the said application. It was contended that the cause of action in previous suit was not similar to the cause of action in the instant suit. It was further stated that the parties and the subject matter in the two suits were different hence a stay of proceedings should not be granted. It was also the plaintiffs' case that a stay of proceedings under Order 25 rule 4 of the Rules was discretionary and that was not a fit case for the grant of stay of proceedings.

C. Defendant's rejoinder

5. The defendant filed a supplementary affidavit sworn by Paresh Jarantil Maru on 20.01.2025 in response to the grounds of opposition. The defendant reiterated his earlier averments that the 3 named plaintiffs were parties to the previous suit; that the subject matter of litigation in both suits was the same; and that the reliefs sought in both suits were essentially the same.

D. Directions on submissions

6. The material on record shows that when the application came up for inter partes hearing it was directed that it shall be canvassed through written submissions. The record shows that the defendant filed his written submissions on 11.02.2025 but the plaintiffs did not file any. The plaintiffs advocate informed the court that he shall rely entirely upon the ground of opposition on record.

E. Issues for determination

7. The court has perused the defendant's notice of motion dated 26.7.2024, the plaintiffs' grounds of opposition, the defendant's supplementary affidavit as well as the material on record. The court is of the view that the main question for determination is whether or not the defendant is entitled to the order of stay of proceedings sought.

F. Analysis and determination

8. The court has considered the material and submissions on record. The defendant submitted that the plaintiffs had instituted a similar suit over the same cause of action which they discontinued hence the concerned plaintiffs ought to pay the taxed costs of the suit before they can prosecute the instant suit. It was submitted that the cause of action in the previous suit was the same or essentially the cause as in the instant suit. It was further submitted that the subject matter in both suits was the same.
9. The defendant thus contented that under Order 25 of the Rules he was entitled to be paid his costs for the previous suit in default of which the suit should be stayed in respect of the 3 named plaintiffs. The defendant used the cited of Mohmoud Adam Mohammed v Africa Banking Corporation [2021] eKLR and Davis Mwatela Dzuya and Another v Salim Anjarwalla (the legal representative of the estate Hussein Karimbhai Anjarwalla) 2021 eKLR in support of his application and urged the court to allow the same.



10. Order 25 rule 4 of the Rules stipulates that;

“If any subsequent suit shall be brought before payment of the costs of a discontinued suit, upon the same or subsequently the same cause of action, the court may order a stay of such subsequent suit until such costs shall have been paid”

11. So, has the defendant satisfied the requirement of Order 25 rule 4 of the Rules? The court readily agrees that the subject matter in both suits is the same, that is, Plot No.413/I/MN and that a reference to Plot MN/413/II/MN in the previous suit was merely a typographical error in the plaint. The court agrees that the defendant in the previous suit remains the same even though the number of plaintiffs in the instant suit has increased considerably.

12. The court is, however, not satisfied that the cause of action in both suits are the same or substantially the same. It is evident from the originating summons in the instant suit that the 38 plaintiffs are seeking adverse possession of the suit property under the Limitation of Actions Act (Cap 22). Whereas the cause of action in the previous suit is not clearly discernible from the plaint dated 18.02.2015, it was certainly not an action for adverse possession of the suit property. In the premises, the court is not satisfied that the defendant is entitled to the order of stay sought under Order 25 rule 4 of the Rules.

13. There is another reason why the Defendant’s application should not be allowed. It is evident that the instant suit for adverse possession was filed on behalf of 37 or so claimants. Among those claimants only the 3 named plaintiffs were involved in the previous suit. If the court were to stay the claim by the 3 plaintiffs, then it would result in a splitting of the suit such that part of the suit would proceed for hearing in the normal manner whereas the 3 plaintiffs would have to wait for hearing at a later date. The ultimate result would be that the court may end up with the untidy situation of having more than one judgment in one file. The court is thus of the opinion that this is not one of those cases in which a stay may be a viable option.

G. Conclusion and disposal order

14. The upshot of the foregoing is that the court finds no merit in the defendant’s application for stay of suit. As a result, the defendant’s notice of motion dated 26.07.2024 is hereby dismissed without prejudice to the right of the defendant to enforce payment of his costs through the civil process of execution. Costs of the application shall be in the cause.

Order accordingly.

RULING DATED AND SIGNED AT MOMBASA AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS ON THIS 27TH DAY OF FEBRUARY 2025.

In the presence of:

No appearance for the plaintiffs

Mr. Munyao for the defendant

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Y. M. ANGIMA

JUDGE

