



Nur & 3 others v Tahir Sheikh Said Investments Limited; Shami Motors Limited (Interested Party) (Environmental and Land Originating Summons 162 of 2018) [2024] KEELC 3712 (KLR) (23 April 2024) (Ruling)

Neutral citation: [2024] KEELC 3712 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENTAL AND LAND ORIGINATING SUMMONS 162 OF 2018
NA MATHEKA, J
APRIL 23, 2024**

BETWEEN

**FATMA SUFI NUR 1ST PLAINTIFF
TAHLIL AYAN AHMED 2ND PLAINTIFF
SADI SAFI NUR 3RD PLAINTIFF
MOHAMED MAHMOOD 4TH PLAINTIFF**

AND

TAHIR SHEIKH SAID INVESTMENTS LIMITED DEFENDANT

AND

SHAMI MOTORS LIMITED INTERESTED PARTY

RULING

1. The application is dated 29th January 2023 and is brought under sections 1A, 1B, 3, 3A & 6 of the [Civil Procedure Act](#) Cap 21 seeking the following orders;
 1. This application be certified as urgent and service be dispensed with in the first instance.
 2. There be a stay of proceedings pending the hearing and determination of this application.
 3. This suit be stayed pending the hearing and determination of Mombasa ELC No. E049 of 2023; T.S.S, Investment Limited & 3 others v Bank of Africa & 6 others.
 4. The costs of this application be in the cause.
2. It is premised on the following grounds that this suit seeks to declare the Plaintiffs as the registered owners of Plot No. 154 Section XXI Mombasa Island (the "Suit Property") by virtue of the doctrine



of adverse possession. The Suit Property is said to be charged to Bank of Africa Limited which has purported to exercise its statutory power of sale in favor of the Interested Party herein. Mombasa HCC No. 57 of 2016 was a suit by the Defendant herein challenging Bank of Africa's right to sell and the Interested Party's right to acquire the Suit Property. In a Notice of Motion dated 11th August 2021 filed in Mombasa HCC No. 57 of 2016, the Defendant here sought to restrain the Interested Party here from interfering with possession of the Suit Property. The Interested Party opposed the application vide a Replying Affidavit sworn by Amir Shahzad on 24th August 2021. The High Court (Mativo J. (as he then was)), in a ruling delivered on 25th January 2022, refused the injunction. Msa HCC No. 57 of 2016 has since been dismissed for supposed default, although a notice of appeal has been filed against that order of dismissal. Regardless, the Defendant has filed Msa ELC No. E049 of 2023; T.S.S. Investment Limited & 3 others v Bank of Africa & 6 others. One of the reliefs sought there is a nullification of the sale of the Suit Property here to the Interested Party here. Therefore, if the court hearing Msa ELC No. E049 of 2023 ultimately finds that the sale of the Suit Property was lawful, and the court here finds that the adverse possession claim is merited, there will be two irreconcilable decisions by Courts of coordinate jurisdiction. Further, if the court hearing Msa ELC No. E049 of 2023 finds that the sale was lawful and title has lawfully passed to the Interested Party, it will be unnecessary for this court to decide the merits of the Plaintiffs' claim. The Plaintiffs would have to institute a fresh claim, if they are minded to against the Interested Party. Additionally, the Defendant is significantly prejudiced in defending this matter when there is a finding, though interlocutory, in Mombasa HCC No. 57 of 2016, that it has lost title over the Suit Property, yet this suit presumes that the Defendant has title over the Suit Property. In fact, in a ruling delivered in this suit on 24th March 2022, as well as in a related suit filed by the Interested Party herein that is Mombasa ELC No. 14 of 2021, Matheka J. and Yano J., respectively, were alive to the possibility of conflicting decisions hence stayed the respective suits. To avert the possibilities above, it is in the interests of justice and fairness that this suit be stayed pending the hearing of Msa ELC No. E049 of 2023. The Interested Party will not be prejudiced by a stay of proceedings. In fact, it will be saved from defending a suit which may require no defending. Assuming the suit is to be later defended, there will be no loss, save for the additional time taken to conclude it.

3. In a replying affidavit sworn on 29th January 2024, by Joseph Karanja advocate for the interested party summarized the interested party's position. He discussed the history of the sale where a conditional injunction was issued in Mombasa HCC 57 of 2016 but was set aside by the Court of Appeal in Mombasa CA 99 of 2016 and plot 154/XXI/MN (suit property) was sold on 30th April 2018. Furthermore, he referred this court to injunctive orders existing in this suit issued on 6th July 2018 and with disapproval averred that the defendant obtained further orders of injunction on 14th February 2023. The said advocate further averred that the stay of proceedings is just a delay tactic and that the defendant is on a quest for forum shopping and indicated all the suits filed in various courts. It is trite to note that in all the suits mentioned, they were all dismissed and the only pending injunction is the one dated 14th February 2023. He equated the instant application as being an appeal against the various decisions of the ELC, High Court and Court of Appeal and that this material non-disclosure is sufficient to dismiss the application.
4. Counsel for the defendant in their submissions reiterated the afore mentioned and argued that the plaintiffs claim adverse possession over the defendants registered title. They stated that the plaintiffs would have to prove that the defendant is the registered proprietor otherwise the suit would be dismissed as was held in *Mtana Lewa vs Kabindi Ngala Mwangandi* 2015 eKLR and *Regina Wanjiru Mwago & Another vs Lucy Wairimu Gichuhi & 2 Others* 2019 eKLR. Counsel therefore is inferring that this suit has currently no legs to stand on and is ripe for dismissal and should therefore be stayed pending Mombasa ELC E049 of 2023. He also relied on the possibility of conflicting decisions and the



wasted resources of the court in listening to separate suits involving the same suit property. Counsel for the interested party in his submissions reiterated the afore mentioned and with the authority of *Henderson vs Henderson* (1843-60) ALL E.R 378 that the application is res judicata as this court had stayed proceedings in Mombasa ELC 14 of 2021.

5. Having heard and considered the merits of the application and the replying affidavit as well as the submissions thereto the issue for analysis is whether the proceedings of this suit can be stayed? The power of stay of proceedings is a discretionary power and I am guided by *Kenya Wildlife Service vs James Mutembei* (2019) eKLR where it was held that:

“...Stay of proceeding 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...”

6. It was also held in *Harman Singh & Others vs Mistri* (1971) EA 122 that: -

“The High Court has inherent jurisdiction to order a stay of a suit for sufficient reason where the ends of justice so require. It is a discretionary power vested in the court.”

7. Furthermore, the court held in *Jadva Karsan vs Harnam Singh Bhogal* (1953) 20 (1) EACA 74 that:

“It is true that there is a wider power under section 97 [now 3A of the *Civil Procedure Act*] to stay proceedings where the ends of justice so require or to prevent an abuse of the Court process.”

8. I have perused the plaint of the mentioned suit in ELC E049 of 2023 and realized that there are many more parties and that the subject matter was breach of statutory duty under the *banking act* and that the court to issue orders inter alia permanent injunction on several properties sold including the suit property. The subject matter is the same in the instant suit except this claim is for adverse possession while the other suit is a claim for several prayers such as declaration of various charges and further charges as unlawful and vacant possession of several properties. Although this suit was filed in 2018 which is five years before the said suit of Mombasa E049 of 2023 the claim for adverse possession touches on the ownership of the suit property by the defendant. Currently the same is in dispute and being litigated on by third parties.

9. The suit property was sold by Bank of Africa Limited through statutory power of sale to the interested party and that there is a pending suit filed by itself against the above-mentioned bank challenging the statutory power of sale. The suit Mombasa ELC E049 of 2023 seeking inter alia nullification of the statutory power of sale. If the court rules that the statutory power of sale was lawful then the suit would belong to the interested party and not the defendants. I find that there is need to stay this matter to avoid conflicting decisions. I find this application is merited and I grant the following orders;

1. This suit be stayed pending the hearing and determination of Mombasa ELC No. E049 of 2023; T.S.S, Investment Limited & 3 others v Bank of Africa & 6 others.
2. The costs of this application be in the cause.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 23RD DAY OF APRIL 2024.



N.A. MATHEKA
JUDGE

