



**Ruda v National Land Commission & 5 others; Kalume & 16 others (Interested Party)
(Civil Suit 335 of 2017) [2024] KEELC 5975 (KLR) (19 September 2024) (Ruling)**

Neutral citation: [2024] KEELC 5975 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
CIVIL SUIT 335 OF 2017
LL NAIKUNI, J
SEPTEMBER 19, 2024**

BETWEEN

HARJI GOVIND RUDA PLAINTIFF

AND

NATIONAL LAND COMMISSION 1ST DEFENDANT

KENYA NATIONAL HIGHWAY AUTHORITY 2ND DEFENDANT

REGISTRAR OF TITLES MOMBASA 3RD DEFENDANT

ABEID HAKIM ABEID 4TH DEFENDANT

NAZIR AHMED KASSIM SULEIMAN 5TH DEFENDANT

EDWARD KIGURU LAND SURVEYORS 6TH DEFENDANT

AND

KAHINDI CHARO KALUME & 16 OTHERS INTERESTED PARTY

RULING

I. Introduction

1. This Honourable Court is tasked on upon hearing, make a determination of the Notice of Motion application dated 8th May, 2024 by the Harji Govind Ruda, the Plaintiff/Applicant herein. The application was brought under the provision of Article 40 (3), 50 (1) of *the Constitution* of Kenya, 2010, Sections 1A and 1B of the *Civil Procedure Act*, Cap. 21.
2. Upon service of the Notice of Motion application there were responses to the it.



II. The Plaintiff/Applicant's case

3. The Plaintiff sought for the following orders: -
 - a. Spent.
 - b. That this Honourable Court do issue a temporary order staying this proceedings pending the hearing and determination of application dated 15th September 2022
 - c. That in line with prayer 2 above, this Honourable court mention this matter on a later date, to confirm the outcome of the said application.
 - d. That the costs of this application be in the cause.
4. The application is supported by the grounds, testimony and the averments made out under the 12 Paragraphed supporting affidavit of Harji Govind Ruda, the Plaintiff/Applicant herein. It is together with seven (7) annexures marked as "A – G" annexed hereto. The Plaintiff/Applicant averred that: -
 - a. The Plaintiff herein is the legal, registered and bonafide owner of the land parcel that comprises title LR. MN/VI/3790 (CR.27624) now to be registered as MN/V/2618 the subject of these proceedings. (annexed in the affidavit a copy of new deed plan for MN/V/2618 and copy of title for MN/VI/3790 marked as "A" and "B" respectively).
 - b. MN/VI/3790 was initially erroneously registered as such instead of MN/V/3790 but the error was corrected by the Director of Survey and later a new deed plans no MN/V/2618 was issued for the land parcel. (Annexed in the affidavit and marked as "C" and "D" respectively a copy of letter from Director of Surveys dated 19th November 2010 and internal memo dated 5th March 2014).
 - c. In a surprising turn of events it came to his attention that MN/V/2618 was purportedly cancelled by among others the Director of Survey and Land Registrar because of sub-division MN/V/387 arising from a judgement issued in 2014 arising from ELC 194 OF 2010. (annexed in the affidavit and marked E is a copy of the said letters dated 23rd December 2015 and 17th August 2017).
 - d. Upon further due dilligence by his advocate on record Mr. Borona, he filed application dated 15th September, 2022 to have the 2014 Judgement in ELC 194 of 2010 set aside and/or reviewed. (Annexed in the affidavit and marked as "F" was a copy of the said application).
 - e. On 24th April, 2024 the court allowed his application dated 26th January 2023 to amend the application dated 15th September, 2022. That application sought to consolidate ELC 194 of 2010 and ELC 335 of 2017 and was pending determination by the trial court.(Annexed in the affidavit and marked as "G" was a copy of the ruling and amended application).
 - f. If the application dated 15th September 2022 was allowed then it would be necessary to join additional parties to this suit.
 - g. If the hearing scheduled on 13th May, 2024 were to proceed then the same may amount to an academic hearing since if the application dated 15th September 2022 was allowed there would be need to allow the parties joined to file pleadings and responses filed thereto.
 - h. This application was made in good faith and without delay as the ruling allowing for the application to consolidate both suits was delivered on 24th April 2024.



- i. No party would be prejudiced if the orders sought herein were granted in fact it would save parties costs and time expense.

IV. Submissions

5. On 13th July, 2024 while the Parties were present in Court, they were directed to have the Notice of Motion application dated 8th May, 2024 be disposed of by way of written submissions. By the time of penning down this ruling only the Plaintiff/Applicant had fully complied. Pursuant to that on a ruling date was reserved on 31st July, 2024 by Court accordingly. However, due to unavoidable circumstances and taking that the Court was not sitting on that material date it was deferred to 19th September, 2024.

A. The Written Submissions of the Plaintiff/Applicant

6. The Plaintiff/Applicant through the Law firm of Messrs. Borona & Associates Advocates filed his written submissions dated 10th June, 2024. Mr. Borona Advocate averred that the submissions were in relation to the Applicants Notice of Motion Application dated 8th May, 2024. The Applicant relied on the following documents:-
 - a. The Affidavit in support of the Notice of Motion sworn by Harji Govind Ruda on 9th May, 2024.
 - b. The List, Digest and Bundle of authorities filed alongside the submissions.
7. On the factual context, the Learned Counsel submitted that the Plaintiff/ Applicant filed an application dated 15th September 2022 seeking review of the court's Judgement in the civil case of "ELC 194 of 2010 Kahindi Charo Kalume & 16 others – Versus - The Legal Representatives of Cassam Suleiman Sumar & Haji Dad Kumberi and others". (see Annexure "E" of the Applicants supporting Affidavit dated 8th May, 2024).The reason for seeking the review is that the implementation of the Judgement dated 30th October, 2014, in ELC 194 of 2010 had adversely impacted the Plaintiffs/ Plot, MN/V/3790 (CR.27624) now designated as MN/V/2618. For purposes of this Application, the Plaintiffs/ Plot shall be referred to herein as the suit property.
8. Furthermore, the adverse proceedings which led to the resultant Judgement were devoid of any due process on the Plaintiff herein, as he was not served with any documents/pleadings to include him in the suit prior to the adverse Judgement being issued. On 24th April, 2024 the court. in ELC 194 of 2010 allowed the Plaintiffs application to amend the application dated 15th September 2022 to include, prayers seeking for consolidation of that suit, to the current suit before the Honourable Court. (see ruling dated 24th April 2024 annexure G of the Applicants Application dated 8th May, 2024).
9. The Learned Counsel submitted that it therefore followed, that the issue of consolidation of ELC 194 of 2010 with this suit, was a live issue before Justice Kibunja (see annexure marked as "G" of the Applicants Application dated 8th May, 2024). In the likely event, that ELC 194 of 2010 was consolidated with this suit, then there would be need to conduct fresh pre-trials with a view to hearing of the consolidated matters and to allow all parties an opportunity to respond to the pleadings in that suit.
10. The Learned Counsel asserted that it was not in the interest of justice, nor would it be proper use of judicial resources, to proceed with the hearing of this suit now, and then go back to pre-trials later, that is in the event that, the suit in ELC 194 of 2010 is consolidated with this one. The balance of convenience tilts in adjourning the hearing of this matter as they await the ruling of the Court in ELC 194 of 2010 in regard to the application for consolidation of the suits.



11. The Learned Counsel also opined that the principle regarding use of judicial time in the case of:- “Muchanga Investments Limited v Safaris Unlimited (Africa) Limited and 2 others [2009] eKLR” should be applied to this case. Furthermore, they urged the Court to consider that, the Plaintiff/Applicant had brought this Application timeously and in good faith. The Plaintiff/Applicant in ELC 194 of 2010, filed his application for review and consolidation on 15th September 2022 and 26th January 2023 respectively. Through no fault of the Plaintiff herein, the ruling regarding leave to amend application dated 15th September, 2022 was delivered on 24th April, 2024 and now, by virtue of that ruling, the court was to determine whether ELC 19 of 2010 would be consolidated with this suit.
12. On the legal basis for supporting the Notice of Motion Application dated 8th May, 2024, the Learned Counsel submitted that Section 1B of the *Civil Procedure Act*, Cap. 21 places a duty on this court to among others: ensure that matters handled before it are handled in a manner that was guided by the principle of just determination of proceedings and efficient use of the judicial and administrative resources. It was their submission, that allowing the Plaintiffs application dated 8th May 2024 herein would be in harmony with these guiding principles. The Learned Counsel invited the Court to note that, allowing the Plaintiffs application herein will be in the interest for all parties and neither party will be prejudiced in a manner that cannot be compensated in costs upon final determination of this suit.
13. In conclusion, the Learned Counsel humbly urged Court to have the Notice of Motion Application dated 8th May 2024 be allowed as prayed.

V. Analysis and Determination

14. The Honourable Court has considered the application by the Plaintiff and his written submissions, the cited authorities, the provision of *the Constitution* of Kenya, 2010 and the statutes.
15. For the Honourable Court to arrive at an informed, reasonable and fair decision, it has framed two (2) issues that fall for determination in the Notice of Motion application dated 8th May, 2024: -
 - a. Whether this Honourable Court should issue temporary order staying this proceedings pending the hearing and determination of application dated 15th September 2022?
 - b. Who bears the Costs of the Notice of Motion application dated 8th May, 2024.

Issue No. a). Whether this Honourable Court should issue temporary order staying this proceedings pending the hearing and determination of application dated 15th September 2022.

16. Under this Sub - heading, the Court shall examine to understand the serious nature of an order of stay of proceedings. The provision of Section 6 of the *Civil Procedure Act*, Cap. 21 provides for stay of suits. It is worded thus: -

“No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”

Explanation. —The pendency of a suit in a foreign court shall not preclude a court from trying a suit in which the same matters or any of them are in issue in such suit in such foreign court.



17. The above section is a bar to parallel prosecution of cases in two fora of equal jurisdiction. Halsbury's Law of England, 4th Edition. Vol. 37 pages 330 and 332, sheds light on stay of proceedings and states thus:

“The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the court's general practice is that a stay of proceedings should not be imposed unless the proceeding beyond all reasonable doubt ought not to be allowed to continue.”

“This is a power which, it has been emphasized, ought to be exercised sparingly, and only in exceptional cases...”

18. The Plaintiff has averred that he was the legal, registered and bonafide owner of the land parcel that comprises title LR. MN/VI/3790 (CR.27624) now to be registered as MN/V/2618 the subject of these proceedings. (annexed in the affidavit a copy of new deed plan for MN/V/2618 and copy of title for MN/VI/3790 marked A and B respectively). MN/VI/3790 was initially erroneously registered as such instead of MN/V/3790 but the error was corrected by the Director of Survey and later a new deed plans no MN/V/2618 was issued for the land parcel. (Annexed in the affidavit and marked as “C” and “D” respectively a copy of letter from Director of Surveys dated 19th November 2010 and internal memo dated 5th March 2014).

19. In a surprising turn of events it came to his attention that MN/V/2618 was purportedly cancelled by among others the Director of Survey and Land Registrar because of sub-division MN/V/387 arising from a judgement issued in 2014 arising from ELC 194 of 2010. (annexed in the affidavit and marked as “E” is a copy of the said letters dated 23rd December 2015 and 17th August 2017). Upon further due dilligence by his advocate on record Mr. Borona, he filed application dated 15th September, 2022 to have the 2014 Judgement in ELC No. 194 of 2010 set aside and/or reviewed.

20. On 24th April, 2024 the court allowed his application dated 26th January 2023 to amend the application dated 15th September, 2022. That application sought to consolidate ELC No. 194 of 2010 and ELC 335 of 2017 and was pending determination by the trial court.(Annexed in the affidavit and marked as “G” a copy of the ruling and amended application).

21. The Plaintiff/Applicant has made elaborate submissions on why this suit should be stayed. He seems to believe that if this suit is not stayed, there will be two contradictory orders emanating from the two Honourable courts.

22. In the case of “Kenya Wildlife Service v James Mutembei [2019] eKLR”, Gikonyo J held that:

“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”.

23. Further, in the persuasive authority in “Global Tours & Travels Limited; Nairobi HC Winding up Cause No. 43 of 2000” Ringera J, (as he then was) stated that: -

“As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the



interest of Justice the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously”.

24. In the case of:- “Kenya Wildlife Case (Supra)”, Gikonyo J quoted Halsbury’s Law of England, 4th Edition. Vol. 37 page 330 and 332, that:

“The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the court’s general practice is that a stay of proceedings should not be imposed unless the proceeding beyond all reasonable doubt ought not to be allowed to continue.”

This is a power which, it has been emphasized, ought to be exercised sparingly, and only in exceptional cases.”

It will be exercised where the proceedings are shown to be frivolous, vexatious or harassing or to be manifestly groundless or in which there is clearly no cause of action in law or in equity. The Applicant for a stay on this ground must show not merely that the Plaintiff might not, or probably would not, succeed but that he could not possibly succeed on the basis of the pleading and the facts of the case”.

25. I am persuaded by the above authorities which lay down the clear principles that stay of proceedings is a grave matter to be entertained only in the most deserving cases as it impacts the right to expeditious trial. Ideally, it is a discretionary power exercisable by the court upon consideration of the facts and circumstances of each case. As stated by the Court of Appeal in the case of “David Morton Silverstein – v Atsango Chesoni [2002] eKLR”: -

“The Court is not laying down any principle that no order for stay of proceedings will ever be made; that would be contrary to the provisions of rule 5 (2) (b) of the Court’s own rules.”

26. Regardless of which orders were feasible, due regard must be given to time in order to avoid delaying this matter any further. In the case of “Muchanga Investments Limited v Safaris Unlimited (Africa) Ltd & 2 Others [2009] eKLR”, the Court of Appeal stated that:

“Judicial time is the only resource the courts have at their disposal and its management does positively or adversely affect the entire system of the administration of justice.”

27. It is acknowledged that the order of stay of proceedings is a drastic order and needs to be given only in exceptional circumstances. This is because it restricts the right of a party to be heard. When I weigh the pros and cons of either proceeding with the matter, which already has a hearing date, or staying the proceedings, it is my view that it is more expeditious to proceed with the case rather than to stay it. I am not thus persuaded to stay the proceedings herein. The ruling of this matter has been scheduled for the 9th October, 2024 which date was reserved by the Honourable Court on 13th May, 2024.



28. Be that as it may, any order issued herein may be contradictory to orders that are issued in ELC No. 194 of 2010 in which judgment has already been issued on 20th October, 2014 concerning the suit property in this case. The granting of an order for stay of proceedings is purely a matter of judicial discretion. The principles surrounding the granting of an order for stay of proceedings were aptly discussed by the court in the case of “William Kamunge & 2 others – Versus - Muriuki Mbithi [2016] eKLR” inter alia as follows:-

“.....it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously”

29. Being of that orientation, when I place all these matters on scale, the preponderant weight tilts towards refusing the request for stay of proceedings. The answer to “.... the sole question... whether it is in the interest of justice to order a stay of proceedings” is; it will be in the interest of justice, Equity and Conscience to stay proceedings pending the hearing of an application dated 15th September 2022 by the Plaintiff/Applicant herein.

IssueNo. B: Who bears the Costs of the Notice of Motion application dated 8th May, 2024

30. It is now well established that the issue of Costs is at the discretion of the Court. Costs meant the award that is granted to a party at the conclusion of the legal action, and proceedings in any litigation. The Proviso of Section 27 (1) of the Civil Procedure Rules Cap. 21 holds that Costs follow the events. By the event, it means outcome or result of any legal action. This principle encourages responsible litigation and motivates parties to pursue valid claims. See the cases of “Harun Mutwiri v Nairobi City County Government [2018] eKLR and “Kenya Union of Commercial, Food and Allied Workers v Bidco Africa Limited & Another [2015] eKLR, the court reaffirmed that the successful party is typically entitled to costs, unless there are compelling reasons for the court to decide otherwise. In the case of “Hussein Muhumed Sirat v Attorney General & Another [2017] eKLR, the court stated that costs follow the event as a well-established legal principle, and the successful party is entitled to costs unless there are other exceptional circumstances.

31. In the present case, the Honourable Court reserves the discretion not to award any costs.

V. Conclusion and Disposition.

32. Ultimately in view of the foregoing detailed and expansive analysis to the application, the Honourable Court arrives at the following decision and make below orders:-

- a. That the Notice of Motion application dated 8th May, 2024 be and is hereby found to have merit as is hereby allowed with no orders as to costs.
- b. That this Honourable Court do and hereby issues a temporary order staying this proceedings pending the hearing and determination of application dated 15th September 2022.
- c. That in line with prayer 2 above, this Honourable court mention this matter on a later date, to confirm the outcome of the said application.
- d. That for expediency sake, the Notice of Motion application dated 15th September, 2022 to be heard “Inter Parte” on 17th October, 2024 and ruling delivered on 9th December, 2024. All parties are at liberty to file and serve their replies within the next 7 days from the date of the delivery of this Ruling.



- e. That there shall be no orders as to the costs of the Notice of Motion application dated 8th May, 2024.

It is so Ordered Accordingly.

RULING DELIVERED THROUGH MICROSOFT TEAM VIRTUAL, SIGNED AND DATED AT MOMBASA THIS 19TH DAY OF SEPTEMBER 2024.

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HON. MR. JUSTICE L. L. NAIKUNI
ENVIRONMENT AND LAND COURT AT
MOMBASA

Ruling delivered in the presence of:

- a. M/s. Mbula, Court Assistant;
- b. No appearance for the Plaintiff/Applicant.
- c. No appearance for the 3rd, 5th & 6th Defendant/Respondents & the Interested Parties.
- d. Mr. Muganda Advocate for the 2nd Defendant/Respondent.
- e. Mr. Mohamed Advocate for the 4th Defendant/Respondent.

