



REPUBLIC OF KENYA



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Kyambuthi v Kiambuthi & 2 others; Kiambuthi (Interested Party) (Environment & Land Case 786 of 2015) [2024] KEELC 6868 (KLR) (17 October 2024) (Ruling)

Neutral citation: [2024] KEELC 6868 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 786 OF 2015
OA ANGOTE, J
OCTOBER 17, 2024

BETWEEN

LUCY WANJIKU KYAMBUTHI PLAINTIFF

AND

JOHN KABAA KIAMBUTHI 1ST DEFENDANT

RICHARD NJOROGE KIAMBUTHI 2ND DEFENDANT

PETER NGUGI KIAMBUTHI 3RD DEFENDANT

AND

MARGARET WAMBUI KIAMBUTHI INTERESTED PARTY

RULING

Background

1. Before this Court for determination is the Plaintiff's/Applicant's Notice of Motion application dated 14th December, 2023 brought pursuant to the provisions of Sections 1, 1A, 3A, 6 and 63 (e) of the *Civil Procedure Act*, Section 13(7) of the *Environment and Land Court Act* and Order 42 Rule 6 (1) and Order 51 Rule 1 of the Civil Procedure Rules seeking the following reliefs:
 - i. That there be a stay of proceedings in this matter pending the substitution of the Interested Party herein who is the registered proprietor of the suit property Land Reference Dagoretti/ Kinoo/2828.
 - ii. That the costs of the application be in the cause.
2. The application is based on the grounds on the face of the Motion and supported by the Affidavit of Lucy Wanjiku Kyambuthi, the Plaintiff/Applicant herein of an even date, who deponed that parcel of



land known as Dagoretti/Kinoo/2828 (the suit property) is registered in the name of the Interested Party who passed away on 1st October, 2021 and that no substitution has taken place.

3. It was deponed that should the matter proceed for hearing, any orders granted will be incapable of being enforced as the Interested Party's name appears on the title and no succession has been undertaken in respect of the Interested Party.
4. Further, she averred, the suit property is the subject of Succession Cause no 99 of 1997-Estate of Reuben Jones Kyambuthi(deceased) where she is seeking revocation and/or annulment of the grant that vested the property into the Interested Party's name; that the aforesaid matter has been active before the Succession Court and had been scheduled for a hearing on the 22nd January, 2024 and that the outcome of the Succession Cause will have a direct bearing on this matter as the suit property is comprised in the grant she seeks to revoke.
5. According to the Plaintiff, the Succession Court issued orders preserving the suit property pending the outcome of the Motion to revoke the grant and that no party will suffer any prejudice should the orders sought be granted.
6. In response, the 3rd Defendant/Respondent swore a Replying Affidavit on the 15th April, 2024. He deponed that the Plaintiff was fully aware of the existence of the Succession Cause No 99 of 1997 when she filed the present suit in 2015; that when the aforesaid Succession Cause was slated for further hearing on the 22nd January, 2024, having been part heard, the Plaintiff insisted that the matter proceeds for hearing de novo and that this insistence was despite her knowledge that the 1st Interested Party, whose evidence was already on record had died in 2021.
7. According to the 3rd Defendant, as a result of the foregoing, the matter was removed from the cause list of 22nd January, 2024 and slated for mention on the 27th May, 2024 to confirm whether parties will have agreed on how to proceed; that the Plaintiff filed a formal application seeking to have the matter commence de novo; that considering the backlog, the matter will be heard at the end of this year or next year and that as regards substitution, the Plaintiff has had sufficient time to substitute or cause substitution of the Interested Party who died approximately three years back.
8. He posited that no order was issued by the Succession Court preserving the suit property until its conclusion; that the outcome in Succession Cause 99 of 1997 will have no bearing on this suit as all the beneficiaries of the late Reuben Jones received their beneficial shares with the Interested Party getting Dagoretti/Kinoo/2828 and that the Plaintiff sold all the property she inherited and now wants to selfishly take the suit property which belonged to the Interested Party.
9. The 3rd Defendant urged that the present Motion is meant to deliberately delay and/obstruct the course of justice in this suit which has not been heard since 2015 and that the Plaintiff is not deserving of this Courts' discretion.
10. The Plaintiff filed a Supplementary Affidavit in which she deposed that the suit property is a parcel of land measuring 46ft by 126ft located within Dagoretti/Kinoo/2828 gifted to her by her late mother and that she set up a business centre on the property at a cost of Kshs 10,000,000.
11. According to the Plaintiff, the 3rd Defendant further prevented her from accessing the centre ultimately financially crippling her; that the foregoing necessitated the filing of the present suit to have the Court restrain the 3rd Defendant from evicting her and grant her access to the centre and that the 3rd Defendant is a violent man who has attempted to take her life by crushing her with his car.
12. It was her deposition that after their late mother passed on, she and the 1st Defendant sought to have the 3rd Defendant undertake succession but he declined to do so and they went to the chief to ensure that



- the 3rd Defendant does not unilaterally commence succession proceedings and that the suit property is the subject of succession proceedings as both the suit property and the house she currently resides on are on Dagoretti/Kinoo/2828.
13. It was deposed that she and the Interested Party constructed the house after her late father Reuben Jones Kyambuthi requested her to live with her mother, and to that end put up a house separate from the matrimonial home where they could reside for the rest of their lives and that the 3rd Defendant has been trying to evict her from the house aforesaid.
 14. According to the deponent, there is a court order preserving the status quo and which directed that she remains on the property pending the determination of the summons for revocation of grant; that additionally, the Court directed that the entire estate of the late Reuben Jones Kyambuthi be preserved pending the determination of the aforesaid Motion and that delays in the succession cause have been caused by the 3rd Defendant's actions in refusing to comply with Court orders such as the one directing that the matter begins de novo necessitating the filing of a Motion in that respect.
 15. The Plaintiff urged that the 3rd Defendant does not reside on the property and subsequently will suffer no prejudice should the orders sought be granted; that the 3rd Defendants' assertions that she sold her inheritance is untrue and the true position is that he sold a plot registered in her name without her authority and that it would be highly unprocedural for a Court to proceed with this matter where the property is under contention in the Succession Court.
 16. The Plaintiff's/Applicant's advocate filed submissions on the 20th April, 2024. Counsel submitted that pursuant to Section 3A as read with Section 63(e) of the *Civil Procedure Act*, this Court has the mandate to make orders necessary for the ends of justice to be met; that the Court in *Muchanga Investments Ltd vs Safaris Limited (Africa) Ltd & 2 Others [2009]eKLR* emphasized that judicial time is precious and should not be wasted and that proceeding with this matter will not only waste judicial time but will be tantamount to intermeddling with the deceased's' estate.
 17. Counsel averred that in *Kenya Alliance Insurance Co Ltd vs Annabel Muthaki Muteti[2020]eKLR*, the Court found that a stay of proceedings to seek a hearing on a major legal point was necessary. Reliance in this respect was also placed on the case of *Christopher Ndolo Mutuki vs CFC Stanbic Limited [2015] eKLR*.
 18. It was submitted that the Plaintiff has established sufficient cause warranting the stay of proceedings having established that there are existing orders pertaining to the parcel of land where the suit property is located; that further, as the registered owner of the suit property is deceased and no succession has been done, any orders as regards the suit property will be tantamount to intermeddling and that the Motion was filed as soon as the orders of 24th October, 2023 were issued reversing the Court's earlier directions that the suit awaits the outcome of succession cause 99 of 1997.
 19. The 3rd Defendant did not file submissions.

Analysis and Determination

20. Having canvassed the pleadings, the sole issue that arises for determination is whether the present proceedings should be stayed. Black's Law Dictionary, Ninth Edition, defines a proceeding as:
 - “(1) The regular and orderly progression of a law suit, including all acts and events between the time of commencement and the entry of judgment; (2) any procedural means of seeking redress from a tribunal or agency; (3) an act or



step that is part of a larger action; (4) the business conducted by a Court or other official body, a hearing.”

21. This Court’s jurisdiction to stay proceedings is part of its inherent jurisdiction as expressed under Section 3A of the *Civil Procedure Act* and reiterated in Section 13(7) of the *Environment and Land Court Act*. It is common ground that where a Court is called upon to exercise discretion, it must do so judiciously. This was aptly expressed by the Court of Appeal in *Patriotic Guards Ltd vs James Kipchirchir Sambu, Nairobi CA No. 20 of 2016*, [2018] eKLR as follows:

“It is settled law that whenever a court is called upon to exercise its discretion, it must do so judiciously and not on caprice, whim, likes or dislikes. Judicious because the discretion to be exercised is judicial power derived from the law and as opposed to a judge’s private affection or will. Being so, it must be exercised upon certain legal principles and according to the circumstances of each case and the paramount need by court to do real and substantial justice to the parties in a suit.”

22. Halsbury’s Law of England, 4th Edition, Vol 37 at pages 330 and 332 stated as follows with regards to stay of proceedings:

“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 proceedings beyond all reasonable doubt ought not to be allowed to continue.”

23. Discussing the nature of stay of proceedings, the Court in *Church Road Development Co. Ltd vs Barclays Bank of Kenya Ltd* (2007) eKLR, noted as follows:

“Black’s Law Dictionary defines ‘stay of proceedings in the manner following;

‘The temporary suspension of the regular order of proceedings in a cause, by direction or order of the Court, usually to await the action of one of the parties in regard to some omitted step or some act which the Court has required him to perform as incidental to the suit; as where a non-resident plaintiff has been ruled to give some security for costs. It is similar to an injunction with which a Court freezes its proceedings at a particular point. It can be used to stop the prosecution altogether, or to hold up some phase of it, such as an execution about to be levied on a judgment.’

Evidently, the scope of an order for stay of proceedings is wide as it is varied. It could relate to a specific action, such as taxation or execution; and it could also relate to the prosecution of the suit altogether.”

24. Similarly, the Court in *Ferdinand Ndung’u Waititu vs Independent Electoral & Boundaries Commission (IEBC) & 8 others* [2013] eKLR held as follows:

“A stay of proceedings involves arresting or stopping proceedings. It is a tool used to suspend proceedings to await the action of one of the parties in regard to some step or some act (see Black’s Law Dictionary). This implies that the rationale for stay is the pendency of an act or step either required by the court or sought by a party. It may be grounded on a statutory



provision or on the need of a party and based on a plea for the plenary exercise of the court's discretion.”

25. The Plaintiff contends that the suit property herein is registered in the name of the 1st Interested Party who has since died and that succession not having been undertaken, no orders can lie as against the property; that the property is the subject of Succession Cause No 99 of 1997-Estate of Reuben Jones Kyambuthi where she is seeking revocation and annulment of the grant that vested the property in the Interested Party's name.
26. She contends that the outcome of the Succession Cause will have a direct bearing in this matter as the suit property is comprised in the grant she seeks to revoke and that additionally, the Succession Court issued orders preserving the suit property pending the outcome of the Motion for revocation of the grant.
27. On his part, the 3rd Defendant asserts that the Motion constitutes an attempt to delay the conclusion of the suit; that the Plaintiff was fully aware of the existence of succession cause number 99 of 1997 when she filed the present suit in 2015; that despite the succession cause being part-heard, the Plaintiff has filed a Motion seeking to have it start de novo further delaying the same and that there are no orders by the succession court preserving the suit property pending determination of the matter.
28. The 3rd Defendant maintains that the outcome of the succession cause will have no bearing on this suit as all the beneficiaries of the late Jones Reuben Kyambuthi received their respectful shares and that the Plaintiff received her share, sold the same and now seeks to have more.
29. Vide the Motion dated the 3rd July, 2017, in Succession Cause 99 of 1997, the Plaintiff seeks inter-alia to have the will dated 23rd August, 1994 invalidated, and the grant of probate of written will and confirmation of grant issued on 22nd April, 1997 and 11th July, 1997 revoked and annulled. It is her case therein that the will lodged in Court is a fraudulent and sham will and that the same did not capture her deceased's father's wishes pertaining to his estate in accordance to his draft will of 23rd August, 1994.
30. It is her further case in the Succession Cause that as per the original will, each child and widow were to get an acre of land plus a plot measuring 30ft by 310 ft with a common access road from Dagoretti/Kinoo/1838 and any excess would be registered in the names of all the survivors equally and in common; that she and the Interested Party were to get another plot measuring 30ft by 110ft; that the deceased had bequeathed a separate plot with an incomplete house in Dagoretti/Kinoo/1838 to their mother and that the will expressly provided that she stays on the property aforesaid together with their mother and take care of her.
31. Vide the present suit, the Plaintiff seeks inter-alia, permanent injunctive orders restraining the Defendants from encroaching on her parcel of land known as plot B in Dagoretti/Kinoo/2828, orders restraining the Defendants from physically or verbally abusing her and general damages as against the 1st and 3rd Defendants for trespass.
32. It is her case that L.R Dagoretti/Kinoo/2828, hived off Dagoretti/ Kinoo/1838, is registered in the name of the 1st Interested Party; that she owns a portion being a parcel of land measuring 46ft by 126ft situate within Dagoretti/Kinoo/2828 having been specifically allocated the same and that the 3rd Defendant has trespassed on her portion
33. Considering the foregoing narration, it is apparent that the Plaintiff in both the Succession Cause and vide this suit claims ownership of plot B, situate within Dagoretti/Kinoo/2828. She claims to be entitled thereto by virtue of having been given the same by the Interested Party.



34. However, it is undisputed the registration of the property in the names of the Interested Party was pursuant to a grant of probate issued in the Estate of the late Reuben Jones Kyambuthi. It is this grant that the Plaintiff seeks to have revoked in the Succession Court and one of the properties she seeks to have the Succession Court re-distributed.
35. It is therefore apparent that the question of the proprietorship of portion B of Dagoretti/Kinoo/2828 is a live issue in both Courts and there is a great danger of conflict should both Courts simultaneously undertake a determination of the same. In any event, it is only the Succession Court that can determine the extent of the deceased's estate and the legitimacy of the claims by the Plaintiff as an heir and beneficiary of the estate. As expressed by the Court in *In Re Estate of Alice Mumbua Mutua (Deceased)* [2017] eKLR:
- “.....The *Law of Succession Act*, and the Rules made thereunder, are designed in such a way that they confer jurisdiction to the probate court with respect to determining the assets of the deceased, the survivors of the deceased and the persons with beneficial interest, and finally distribution of the assets amongst the survivors and the persons beneficially interested. The function of the probate court in the circumstances would be to facilitate collection and preservation of the estate, identification of survivors and beneficiaries, and distribution of the assets.”
- Disputes of course do arise in the process. The provisions of the *Law of Succession Act* and the Probate and Administration Rules are tailored for resolution of disputes between the personal representatives of the deceased and the survivors, beneficiaries and dependants.”
36. Indeed, it is after the succession cause has been resolved that she can seek to enforce her proprietary rights, if at all, by seeking to have the Defendants restrained from encroaching on the property and for damages.
37. Further still, it is noted that vide the Orders made on the 25th April, 2017, the Succession Court directed that the Estate of the Late Reuben Jones Kyambuthi be preserved under Section 45 of the *Law of Succession Act* pending the hearing and determination of the revocation of the grant. The court also directed that the Applicant remains on the suit property pending the determination of the revocation proceedings.
38. Under Order 2 aforesaid, the Court directed thus;
- “The matter of the contested suit properties, assets that comprise of the Estate of the deceased including L.R 2828 shall be determined by the Deputy Registrar Family division summoning the Land Registrar, Kiambu to provide green cards/hereditary /backgrounds of the suit properties ...if they are part of the deceased's estate and available for distribution or not.”
39. In light of the aforesaid orders which make specific reference to the suit property, it would be improper for this Court to make any determination thereon. Ultimately, the Court finds that the totality of the circumstances calls for it to stay the matter and await the outcome of the revocation proceedings. The substitution of the Interested Party, if at all, to await the outcome of the succession cause.
40. The Court directs that the Plaintiff pursues the determination of the Succession Cause with due diligence.
41. For those reasons, the Motion dated 14th December, 2023 partly succeeds in the following terms:



- a. The proceedings in this matter be and are hereby stayed pending the hearing and determination of the revocation proceedings in Succession Cause number 99 of 1997, Estate of Reuben James Kiambuthi (deceased).
- b. Each party to bear their own costs.

DATES, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 17TH DAY OF OCTOBER, 2024.

O. A. ANGOTE

JUDGE

In the presence of;

Ms. Wangui for Applicant

Mr. Benji for Respondent

Court Assistant - Tracy

