



**Shikhutuli v Murunga & another (Environment and Land Appeal
E1 of 2021) [2023] KEELC 26 (KLR) (17 January 2023) (Judgment)**

Neutral citation: [2023] KEELC 26 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT AND LAND APPEAL E1 OF 2021
DO OHUNGO, J
JANUARY 17, 2023**

BETWEEN

MAURICE JOMO SHIKHUTULI APPELLANT

AND

FRED BURUDI MURUNGA 1ST RESPONDENT

ALICE SHIHUNDU 2ND RESPONDENT

*(Being an appeal from the ruling and order of the Senior Principal Magistrate's Court at Butali
(Hon. Z J Nyakundi, Senior Principal Magistrate) delivered on 3rd December 2020 in Butali
MCELC No. 39 of 2019 Fred Burudi Murunga and another -v- Maurice Jomo Shikbutuli)*

JUDGMENT

1. This appeal traces its roots to Notice of Motion dated 2nd November 2020, an application which the appellant filed in the Subordinate Court seeking the following orders:
 - a. [Spent]
 - b. That this Honourable court be pleased to stay proceedings in this case, ELC No. 39 of 2019, pending the hearing and determination of summons for revocation and/or annulment of grant filed in Butali SPM Succession Cause No. 246 of 2018 on 27th January, 2020.
 - c. That the costs of this application be provided for.
2. Upon hearing the application, Hon. Z J Nyakundi, Senior Principal Magistrate delivered his ruling on 3rd December 2020, dismissing the application with no order on costs. Dissatisfied with the outcome, the appellant filed this appeal through Memorandum of Appeal dated 12th January 2021.
3. The following are the grounds of appeal as listed on the face of the Memorandum of Appeal:



1. The learned trial magistrate erred in law and fact in disallowing the appellant's application dated 2nd November, 2020 for stay of proceedings in Butali SPM MCL & E No. 39 of 2019 yet the suit title No, North Kabras/Matsakha/848 from which the respondents have, sought the appellant's eviction formed part of the estate of Murunga Kisosi- deceased which was secretly succeeded by the respondents vide Butali SPM Succession Cause No. 246 of 2018 which proceedings have been contested by the appellant.
2. The Learned trial magistrate erred in law and fact in failing to stay the proceedings in Butali SPM MCL & E No. 39 of 2019 as sought by the appellant who has filed summons seeking the revocation of the grant secretly, unlawfully and irregularly obtained by the respondents and further sought the revocation and setting aside of the proceedings to confirm the said grant which improperly conferred title to the respondents thereby illegally and totally excluding and disinheriting the appellant who is an heir and beneficially entitled to the deceased Murunga Kisosi's estate and in particular the suit land parcel No. North Kabras/Matsakha/848 whereon the appellant has been residing and utilising for over 12 years with the knowledge of the respondents which revocation proceedings are scheduled for hearing on 21-1-2021.
3. The Learned trial magistrate erred in law and fact in dismissing the appellant's application for stay of proceedings yet it is only proper and procedural that the questions as to who is beneficially entitled to the suit land parcel No. North Kabras/Matsakha/848 which was part of the estate of the deceased Murunga Kisosi can only be properly dealt with and determined vide the revocation proceedings in Butali SPM Succession Cause No. 246 of 2018 and only after such determination will the court determine whether the respondents have the locus standi to institute or pursue their suit and or whether a cause of action is disclosed in the first place which are preliminary issues.
4. That since the determination of the validity of the grant and the certificate of confirmed grant in Butali SPM Succession Cause No. 246 of 2018 will directly touch on the issues in Butali SPM MCL & E No. 39 of 2019 and in particular who and or if the appellant is entitled to the suit land parcel No. North Kabras/Matsakha/848, it was only prudent and in the interests of justice dictate that the proceedings in Butali SPM MCL. & E No. 39 of 2019 be stayed pending the outcome of the revocation proceedings in Butali SPM Succession Cause No. 246 of 2018 taking cognizance of Section 6 of the *Civil Procedure Act* which requires the court to stay proceedings where the matter in issue is directly and substantially in issue involving the same parties in another court or in other proceedings which is evidently the case in the dispute between the parties hereto.
5. That by directing that Butali SPM MCL & E No. 39 of 2019 proceeds prior, alongside and or before determination of Butali SPM Succession Cause No. 246 of 2018 the learned trial magistrate rendered the appellant's revocation proceedings a nullity and or a mere academic exercise as the appellant risks being condemned unheard, prematurely, unprocedurally and improperly in regard to his heir's interest or beneficial entitlement to the suit land which will occasion the appellant irreparable loss, damage, hardship and inconvenience and which order is faulty, oppressive and unjust.
6. The Learned trial magistrate erred in law by holding that the issue as to whether the appellant was disinherited can only be determined upon a full hearing of Butali SPM MCL & E No. 39 of 2019 which is an erroneous finding as such an issue can only be determined in the succession proceedings but not by a court in a land dispute as a land dispute has no jurisdiction to entertain or determine issues of succession or inheritance.



7. The learned trial magistrate erred in law and fact in further holding that should the court make a determination that the appellant was disinherited he will have an option of applying for revocation of grant yet the appellant demonstrated that he has already filed revocation proceedings which are pending hearing and determination and he erred further by holding that staying the proceedings in the land dispute will clog the system yet the converse is the position as the court risks hearing and determining the same dispute over and over again in multiple proceedings which is needless and a waste of precious judicial time.
 8. The learned trial magistrate failed to determine the issues before him properly and correctly and his decision was arrived at in a cursory and perfunctory manner and was contradictory, unsupported, unjust and indefensible and has occasioned a serious miscarriage of justice.
4. Based on those grounds, the appellant urged this court to set aside the ruling of the Subordinate Court and to allow the appellant's application dated 2nd November 2020 with costs.
 5. The appeal was canvassed through written submissions. The appellant argued that the learned magistrate erred in law and in fact in failing to stay the proceedings since the respondents filed the suit seeking his eviction from N. Kabras/Matsakha/848 (suit property) pursuant to a certificate of confirmation of grant issued in Butali Succession Cause No. 246 of 2018. That he filed his defence disclosing that he is one of the beneficiaries of the suit property and that the respondents failed to disclose all material facts while seeking grant thereby disinheriting him. He relied on Sections 6 and 34 of the *Civil Procedure Act* and Section 13 (7) of the *Environment and Land Court Act* and argued that stay of proceedings ought to have been granted since the respondents did not demonstrate that they would suffer any prejudice if the order was granted. Reliance was placed on the case of *Benson Mathu Wakaba & 2 others -vs- Doris Kigetu Maingi* [2022] eKLR.
 6. The respondents argued that the appellant had not demonstrated that he would suffer any loss if the suit was fast tracked and that the summons for revocation of grant were in the court with jurisdiction to handle succession matters. That since the filing of the summons for revocation of grant through application dated 22nd January 2020, the appellant had not demonstrated which steps he had taken to have the said summons heard and determined and that the appellant was only keen to delay the respondents' suit. In submitting that stay should be imposed only in exceptional circumstances, the respondents relied on *Wycliffe Oparanya Ambetsa -v- Director of Public Prosecution* [2017] eKLR. The respondents therefore urged the court to dismiss this appeal with costs.
 7. I have carefully considered the grounds of appeal and the parties' respective submissions. The only issue for determination is whether the application was merited.
 8. The principles that guide an appellate court while considering an appeal against an order made in the exercise of discretion are settled. The Court of Appeal recently reiterated in the case of *Mombasa Cement Limited v Kitsao & 34 others* (Civil Appeal E016 of 2020) [2022] KECA 562 (KLR) (24 June 2022) (Judgment) that an appellate court will not interfere with the exercise of discretion by an inferior court unless it is satisfied that its decision is clearly wrong due to misdirection or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration with the result that it arrived at a wrong conclusion.
 9. Whether to grant an order for stay of proceedings is an issue of discretion. Discretion, as is the norm, must be exercised judiciously. Among others, the court must consider if it will be in the interest of justice to grant stay of proceedings. Each case must be considered on its own facts and circumstances. It must also be remembered that stay of proceedings is a grave judicial action which seriously interferes with the right of a litigant to conduct his litigation as well as the hallowed right of access to justice. See



Kenya Wildlife Service –vs- James Mutembei [2019] eKLR and *David Morton Silverstein vs. Atsango Chesoni* [2002] eKLR.

10. The appellant sought stay of proceedings to allow for hearing and determination of his application dated 22nd January 2020, which he filed in Butali PM Succession Cause No. 246 of 2018, seeking revocation of grant. It will be noted that as of 3rd November 2020 when Notice of Motion dated 2nd November 2020 was filed, the application for revocation of grant had been pending for 9 months. The appellant, being the applicant in the application for revocation of grant, was in the driver's seat as far as progress of that application was concerned. He was duty bound to demonstrate that he had taken all necessary steps to ensure an early hearing and determination of the application. That duty was brought into sharp focus considering the risk of an unwarranted delay of proceedings which always accompanies an application or stay of proceedings. It was not enough for the appellant to simply state that the application was scheduled for hearing on 21st January 2020. He ought to have sufficiently explained why it had taken a whole year for the application to be heard.
11. As noted earlier in this ruling, stay of proceedings is a grave matter that seriously interferes with the smooth flow of litigation poses a threat to the right of access to justice. Whereas the appellant is free to seek revocation of grant with a view to using the outcome of the application for revocation of grant in such manner as he deems appropriate, it must be remembered that Butali MCELC No. 39 of 2019 and Butali PM Succession Cause No. 246 of 2018 are two separate suits. The former deals primarily with whether the appellant herein should be evicted from N. Kabras/Matsakha/848 while the latter is concluded matter in which the appellant is seeking a reconsideration of the manner of distribution of N. Kabras/Matsakha/848. It is for the appellant to proactively prosecute his application in Butali PM Succession Cause No. 246 of 2018.
12. The appellant relied on Sections 6 of the *Civil Procedure Act* which provides:

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. [Emphasis supplied]
13. Hence, while considering whether to stay proceedings pursuant to Section 6 of the *Civil Procedure Act*, the suit or proceedings cited as a basis for stay should have been commenced prior to the case sought to be stayed. In the context of this appeal, the appellant cited pendency of his application dated 22nd January 2020 filed in Butali PM Succession Cause No. 246 of 2018 as the basis for the stay. He did not rely on the existence of Butali PM Succession Cause No. 246 of 2018 as a whole but grounded his pursuit of stay of proceedings specifically on the application. A perusal of the record shows that the plaint in Butali MCELC No. 39 of 2019 was filed on 30th August 2019 and therefore predates the summons for revocation of grant which was filed in Butali PM Succession Cause No. 246 of 2018 in January 2020. Section 6 of the *Civil Procedure Act* could not therefore be a basis for staying proceedings in Butali MCELC No. 39 of 2019 in that obtained before the learned magistrate.
14. I have read the ruling of the subordinate court. I am not persuaded that there was any misdirection on the part of the learned magistrate or that he arrived at a wrong conclusion. On the contrary, I see no valid reason to warrant interfering with the learned magistrate's exercise of discretion. This appeal is bereft of merit. I dismiss it with costs to the respondents.

DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 17TH DAY OF JANUARY 2023.

D. O. OHUNGO



JUDGE

Delivered in open court in the presence of:

Mr Shiloya holding brief for Mr Akwala for the appellant

Mr Kombwayo holding brief for Mr Khayumbi for the respondents

Court Assistant: E. Juma

