



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 91 OF 2016

MARY KWAMBOKA MOSE.....PLAINTIFF

VERSUS

ASHA CHEBET KIRWA [Being sued in her own capacity and

as Personal Representative of the Estate of

SALEM KIPRONO KIRWA].....DEFENDANT

RULING

[NOTICE OF MOTION DATED 26TH JULY, 2019]

1. The Defendant moved the Court through the Notice of Motion dated the 26th July, 2019 seeking for stay of proceedings pending the hearing and determination of **Court of Appeal Civil Appeal No. 40 of 2018** arising out of the High Court ruling of 20th September, 2018 in **Eldoret High Court Succession Cause No. 192 of 2015** involving the same parties and suit land. The application is premised on the ten (10) grounds on its face and is supported by the affidavits sworn by **Asha Chebet Kirwa**, the Defendant, on the 26th July, 2019 and 28th November, 2019.

2. The application is opposed by the Plaintiff, **Mary Kwamboka Mose**, through her replying affidavits sworn on the 16th September, 2019 and 19th December, 2019.

3. That pursuant to the directions given on the 12th February, 2020 and 6th May 2020, the learned Counsel for the Defendant filed the written submissions dated the 19th October, 2020 on the 30th November, 2020. That however, no submissions filed by the learned Counsel for the Plaintiff was traced on the record despite the information given to the Court on the 9th December, 2020 that they had filed one.

4. The following are the issues for the Court's determinations;

(a) Whether the Defendant has made a reasonable case for staying this proceedings.

(b) Who pays the costs''

5. The Court has considered the grounds on the Notice of Motion, affidavit evidence by both parties, the record, written submissions by the learned Counsel for the Defendant and come to the following determinations;

(a) That this proceedings was commenced through the Plaint dated and filed on the 25th April, 2016. The Plaintiff seeks for four (4) acres out of *Uasin Gishu/Tapsagoi/267* that is registered as *Uasin Gishu/Tapsagoi/1033* among others. That from the affidavit evidence availed, the Plaintiff herein had earlier moved the Succession Court in **Eldoret High Court Succession Cause No. 192 of 2015** through an application dated the 3rd April, 2016 seeking for among others four (4) acres of Uasin Gishu/Tapsagoi/267 that is registered as Uasin Gishu/Tapsagoi/1033. That the Succession Court however, dismissed the application vide its ruling dated the 20th September, 2018.

(b) That according to the Defendant, the Plaintiff lodged an appeal, on the Succession Court's ruling of 20th September, 2018. That the appeal is referenced as **Court of Appeal Civil Appeal No. 40 of 2018**. That the Defendant has annexed to her supporting affidavit copies of the Notice of Appeal dated the 25th September, 2018, Memorandum of Appeal lodged on the 2nd October, 2018 and Notice of Motion lodged on the 4th October, 2018 seeking stay of proceedings in **Eldoret High Court Succession Cause No. 192 of 2015** pending the hearing and determination of the appeal. That the Defendant's instant application seeks the stay of proceedings in this suit pending the hearing and determination of the said appeal pending in the Court of Appeal. That the Plaintiff has opposed the application for stay of proceedings on two grounds. First, that she had not instructed her Counsel on record to file an appeal on the Succession Court's decision of 20th September, 2018 and has since given instructions to Counsel to withdraw it. Secondly, that as the appeal was filed on the 2nd October, 2018, it should be the one stayed and not this suit that was filed earlier. That the court however notes that no documentary evidence was availed to confirm the Plaintiff's instructions to her Counsel on record to withdraw the appeal or of the withdrawal itself having been done. That the appeal is therefore still pending.

(c) That as there is no doubt that the Plaintiff filed the objection proceedings in **Eldoret High Court Succession Cause No. 192 of 2015** before the filing of the instant suit, and as the parties and prayers in both matters are more or less the same, then the filing of this suit is the one that contravenes **Section 6 of the Civil Procedure Act Chapter 21 of Laws of Kenya** and should be stayed pending the hearing and determination of the pending appeal in the Court of Appeal on the orders issued on the 20th September, 2018 on the objection proceedings in the earlier Succession suit.

(d) That though the Defendant is successful in the application and would ordinarily have been entitled to costs under **Section 27 of the Civil Procedure Act**, the Court is of the view that costs be in the cause.

6. That in view of the foregoing, the Court finds merit in the Defendant's Notice of Motion dated the 26th July, 2019 and grants an order of stay proceedings of this suit pending the hearing and determination of **Eldoret Court of Appeal Civil Appeal No. 40 of 2018**. That costs of the application be in the cause.

Delivered virtually and dated at Eldoret this 24th day of March, 2021.

S. M. KIBUNJA

JUDGE

In the presence of:

Plaintiff: Absent.

Defendant: Absent.

Counsel: Mr. Bett for Defendant.

Court Assistant: Christine

and the Ruling is to be transmitted digitally by the Deputy Registrar to the Counsel on record through their e-mail addresses



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