



Okoth & another (Suing as administrator to the Estate of Geoffrey Okoth Oyoye (Deceased)) v Alal & another (Environment & Land Case 688 of 2017) [2023] KEELC 16736 (KLR) (28 March 2023) (Ruling)

Neutral citation: [2023] KEELC 16736 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MIGORI
ENVIRONMENT & LAND CASE 688 OF 2017**

**MN KULLOW, J
MARCH 28, 2023**

BETWEEN

**MARK COLLINS OKOTH 1ST PLAINTIFF
JAMES OMONDI OKOTH 2ND PLAINTIFF
SUING AS ADMINISTRATOR TO THE ESTATE OF GEOFFREY OKOTH
OYOYE (DECEASED)**

AND

**JOSEPH OTIENO ONDENG ALAL 1ST DEFENDANT
SUKARI INDUSTRIES LIMITED 2ND DEFENDANT**

RULING

1. By Notice of Motion dated March 22, 2022, the Plaintiff sought the following orders: -
 - a) Spent
 - b) Spent
 - c) That this honourable court be pleased to discharge and /or set aside and/or vacate the interim orders granted on September 19, 2017.
 - d) That this honourable court be pleased to dismiss this suit for want of prosecution.
 - e) That the costs of this application be provided for.
2. The application is based on the 8 grounds on its face and on the Supporting Affidavit sworn on March 22, 2022 by David Okoth, the 2nd Defendant/ Applicant's General Manager. Briefly, it was his contention that the 2nd Defendant is the absolute registered proprietor of the suit parcel. However, vide



- an Order issued on the September 19, 2017, the court granted interim Orders maintaining the status quo of the suit property, to the Plaintiff/ Respondent's Application dated June 1, 2017.
3. It is his claim that since the grant of the interim orders on September 19, 2017; the Plaintiffs/ Respondents have failed and/or neglected to prosecute the Application, which has greatly prejudiced the Applicant's right over the suit parcel. This is despite the fact that the Plaintiffs/ Respondents are not in occupation of the suit property but the same is occupied and/or managed by the 2nd Defendant/ Applicant. He thus contends that the Plaintiff/ Respondent is misusing the said interim orders to threaten the applicant with contempt of court proceedings.
 4. It is his position that where an Interlocutory injunction has been granted and the Application is not determined within a period of 12 months from the date of the grant; the injunction shall lapse unless for any sufficient reason, the court orders otherwise. He contends that there has been inordinate and inexcusable delay on the part of the Plaintiff/ Respondent in prosecuting the Application and the suit.
 5. As a result of the said delay, the 2nd Defendant/ Applicant shall continue to suffer substantial and irreparable loss unless the orders issued on September 19, 2017 are discharged and/or set aside/ vacated. He maintained that the Plaintiff/ Respondent shall not be prejudiced in the event that the Application is allowed and urged the court to grant the orders sought.
 6. The application was opposed. The 1st Respondent filed a Replying Affidavit sworn on August 19, 2022 by James Omondi Okoth, on his own behalf and on behalf of his Co-Administrator. It is his contention that if prayers 2 & 3 sought in the instant Application are granted, the pending Originating Summons would be rendered superfluous. He further stated that the purpose of the interim orders granted on the September 19, 2017 was to preserve the subject matter of the dispute.
 7. On the relief sought for the dismissal of the suit, it was his contention that the said prayer is premature and uncalled for considering the history of the matter. He dismissed the allegation that the matter has not been prosecuted for a period of over 4 years and maintained that it is public knowledge that from March 19, 2020; court hearings/ operations were either scaled down or closed due to Covid- 19 pandemic. That after the delivery of the ruling on January 16, 2020 there were no available dates for hearing of main suits and the same is known to the Defendants.
 8. It is also his claim that it is the fundamental duty of the court to do justice between the parties and parties should be allowed a proper opportunity to put their cases upon the merits of the matter. He thus contends that striking out their suit for want of prosecution would be a draconian remedy/ action and would result in condemning them unheard and may consequently result in miscarriage of justice and irreparable losses.
 9. He maintained that the Plaintiffs are fully in occupation of the suit property and hence the reason for the grant of the interim orders of status quo as evidenced by the report prepared by the government surveyor; who visited the suit property and compiled a report showing that the suit property is occupied by the Plaintiffs.
 10. He thus contends that that they risk being evicted should the court discharge the status quo orders and the Defendant may proceed to sell/alienate/dispose off the suit land despite them being in occupation since the year 1986. He urged the court to dismiss the Application and give them an opportunity to prosecute the suit to logical conclusion.
 11. The Application was disposed of by way of written submissions; however, upon perusal of the court record, only the Plaintiffs/ Respondents filed their submissions, which I have read and taken into account in arriving at my decision. At the time of writing the ruling, the Applicant had not filed its submissions. Be as it may, I will proceed to issue my ruling as hereunder;



Analysis and Determination

12. This court is of the considered opinion that the issue arising for determination is: -
 - a. Whether the 1st Defendant/Applicant has made out a case for setting aside of the Interim Orders of Status Quo issued on September 19, 2017.
 - b. Whether the Plaintiff's suit should be dismissed for want of prosecution.
13. The court in determining whether or not to grant setting aside orders ought to exercise such powers judiciously, taking into account the circumstances of each case and the reasons advanced therein. The court in *Mbogo vs Shah 1968 EA 93* held as follows: -

' This discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist a person who has deliberately sought whether by evasion or otherwise, to obstruct or delay the course of justice'
14. The Applicant has sought the setting aside of the Interim Orders of Status Quo issued by the court on September 19, 2017 in respect to the Plaintiff's Application dated June 1, 2017. It is his claim that it has been more than 5 years since the said interim orders were issued yet the Application has never been prosecuted. He now contends that there has been an unjustified, inordinate and inexcusable delay on the part of the Plaintiff and the same amounts to an abuse of the said interim orders. Further, he avers that since the Application has not been determined within 12 months, the injunction should lapse.
15. The Respondent on the other hand faulted the delay in prosecuting the matter to the Covid- 19 pandemic and urged the court to grant them an opportunity to prosecute their matter to its logical conclusion. He also maintained that they have been in occupation of the suit land and thus should the interim orders be set aside then they stand to suffer irreparable loss and damage.
16. It is not in contention that the Application dated June 1, 2017 is yet to be finally determined and that the interim orders issued on the September 19, 2017 are still in force. I have critically looked at the Plaintiff/Respondents' Replying Affidavit and I do note that he has not given any sufficient explanation and justification for the inordinate delay in prosecuting the Application and substantive suit. It is his claim that the court issued its last orders sometimes in January 2020 and at the time there were no available dates for hearing and further blamed the Covid- 19 pandemic and the scaling down of the court processes hence the delay.
17. It is general knowledge that from the year 2021 courts countrywide had resumed court operations with various measures put in place in line with the prevailing Covid- 19 pandemic at the time. The Respondent has not provided any proof of the steps taken in an effort to prosecute his case and cannot therefore solely use the Covid – 19 pandemic as a basis of the inordinate delay of more than two years. It is therefore this court's opinion that the Respondent has not provided any sufficient explanation and justifiable cause for the inordinate delay in prosecuting the Application and the Substantive suit.
18. However, I have looked at the circumstances which led to the issuance of the said Interim Orders of Status quo on the September 19, 2017 and particularly the report by the government surveyor on the status of the suit land. From the said Report dated May 9, 2017 in reference to parcel No 345, it is stated that the property is owned by the 2nd Defendant/ Applicant but the same is occupied by the family of the late Geoffrey Okoth Oyoye, the Plaintiffs herein. No contrary report has been adduced by the Applicant herein in support of his allegations of being in occupation of the suit land.



19. The purpose of an Order of status quo is to safeguard the situation so that the substratum of the subject matter of the dispute is not eroded or radically changed. In *Republic v National Environment Tribunal, Ex-parte Palm Homes Limited & Another [2013] eKLR*, Odunga J stated,
- ' When a court of law orders or a statute ordains that the status quo be maintained, it is expected that the circumstances as at the time when the order is made or the statute takes effect must be maintained. An order maintaining status quo is meant to preserve existing state of affairs. Status quo must therefore be interpreted with respect to existing factual scenario.'
20. The Court of Appeal in *Phillip Chemwolo & Another v Augustine Kubende [1986] eKLR*, Apaloo JA recognized that:
- ' Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit. I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court as is often said exists for the purpose of deciding the rights of the parties and not the purpose of imposing discipline'.
21. Therefore, it is in the interest of justice that a party shall not be condemned unheard; Article 50 as read with Article 159 of the *Constitution* provides the right to have any dispute decided in a fair hearing before a court and the need for substantive justice. Further, in view of the fact that the Plaintiffs/ Respondents are currently in occupation of the suit land, I find that the effect of setting aside the interim orders of status quo would have adverse effects on the Plaintiffs as nothing would bar the Applicant herein from dealing with the suit land, which is registered in its name, in a manner that they wish. It is therefore necessary to preserve the subject matter of the appeal by maintaining the status quo pending the hearing and determination of the substantive suit.
22. It is however not lost to this court that the 2nd Defendant/ Applicant has an equal right to have the dispute heard and determined in a timely and expeditious manner. I will therefore proceed to issue strict timelines within which to dispose off the substantive suit to prevent further delays and abuse of the interim orders at the expense of the 2nd Defendant/ Applicant.

Conclusion

23. In the upshot, I accordingly find that the Application dated March 22, 2022 is not merited and is hereby dismissed with no orders as to costs. However, the Plaintiffs/ Respondents are hereby directed to fix the matter for hearing of the main suit within 45 days from the date of this suit and in default the interim orders granted on September 19, 2017 will automatically stand vacated. It is so ordered.

DATED, SIGNED AND DELIVERED VIA ELECTRONICALLY VIA EMAIL AT MIGORI ON 28TH DAY OF MARCH, 2023.

MOHAMMED N. KULLOW

JUDGE

Ruling delivered in the presence of: -

Court Assistant - Tom Maurice/ Victor

