



**Maranya v Mendembo & anor (Environment & Land Case
74 of 2022) [2023] KEELC 17394 (KLR) (11 May 2023) (Ruling)**

Neutral citation: [2023] KEELC 17394 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 74 OF 2022**

EK MAKORI, J

MAY 11, 2023

BETWEEN

ELIZABETH SARINGI MARANYA PLAINTIFF

AND

JULIANA MENDEMBO & ANOR DEFENDANT

RULING

1. The applicant via Notice of Motion dated November 28, 2022 seeks injunctive orders to restrain the respondents from further interfering with Plot No 111 (CR 80759) (Orig Plot No 61) measuring 0.1403 hectares (the suit property), pending the hearing and determination of this suit.
2. The application is opposed. There is a replying affidavit deposed on December 16, 2022. The court directed the parties to do written submissions – they complied.
3. The applicant contends that the National Government allotted her the suit property sometimes in the year 1992. In 1994 after accepting the offer, the Director of Survey was directed by the Lands Office to survey the plot in preparation for the processing of a grant. However, the department of survey was non-responsive which resulted in the engagement of a private surveyor in the year 2009.
4. Finally, on 5th of October 2022 a lease was issued to the applicant after the Director of Survey forwarded the Deed Plan to the Chief Land Register.
5. The lease runs for 99 years from July 1, 2022 with an annual rent of Kshs 1500 per year payable every 1st of January each year.
6. That when the applicant visited the land on 31st November 2022 she discovered there were squatters on the ground, efforts to have the produce ownership titles remained futile.
7. The land needs to be put in use with strict timelines hence this suit seeking that the respondents are trespassers and wasting the land and need to be restrained by way of injunctive orders.



8. The applicant submits that the threshold in granting temporary injunction as stated in *Giella V Cassman Brown* [1973] EA 360 has been met that is a *prima facie* case with probability of success, that the applicant will suffer irreparable injury which cannot be adequately compensated by award of damages if injunctive orders are not issued and that if this court is in doubt, the balance of convenience tilts should towards the applicant who has ownership of the suit property.
9. The applicant has also quoted several other authorities springing from the Giella Case, and how to acquire Government land and proceeded to state that if the occupants of the suit property are in possession of any ownership documents, the same stands null and void.
10. The respondents oppose the application and contend that they have lived on the suit property for a continuous period of over 20 years and had written to the defunct Municipal Council of Malindi then seeking to have building approvals and were permitted to pay rates. Besides the Council issued the with squatter upgrading program form in the year 200 since the respondents had acquired the land since 2002.
11. The respondent doubts the allocation procedure adopted by the applicant which spans for over 20 years and accuses the applicant of laches and delays since 1992 to 2022 to obtain a lease title over the suit property.
12. The respondent has quoted the case of *Bubaki Investment Co. Ltd & 2 Others V National Land Commission & 2 Others* [2015] eKLR stating that a letter of over is valid within 6 months subject to fresh application for fresh allotment which was not the case here.
13. The applicant thinks that this is not one of those cases where injunctive orders should issue. Moreover, that the application should be dismissed with costs.
14. This Court has carefully considered the application, the affidavit in support, the response thereto as well as the rival submissions by both counsels. In my considered opinion, the main issue that arises for determination is whether the applicant has met the threshold for the grant of a temporary injunction pending hearing and determination of the suit herein. Moreover, who should bear costs.
15. The guiding principles for the grant of orders of temporary injunction are well settled and are set out in the judicial decision of *Giella Versus Cassman Brown* (1973) EA 358. This position has been reiterated in numerous decisions from our Superior Courts and more particularly in the case of *Nguruman Limited versus Jan Bonde Nielsen & 2 others* CA No77 of 2012 (2014) eKLR where the Court of Appeal held that:

“in an interlocutory injunction application the Applicant has to satisfy the triple requirements to a), establishes his case only at a *prima facie* level, b) demonstrates irreparable injury if a temporary injunction is not granted and c) if any doubts as to b, by showing that the balance of convenience is in his favour.

These are the three pillars on which rest the foundation of any order of injunction interlocutory or permanent. It is established that all the above three conditions and states are to be applied as separate distinct and logical hurdles which the applicant is expected to surmount sequentially.”
16. The applicant contends that she is the registered owner of the suit land known as Plot No 111 (CR 80759) (Orig Plot No 61) measuring 0.1403 hectares which property she acquired via allotment and grant from the Government of Kenya. The process leading to that spans from the year 1992 to 2022



when a lease was issued to her only to find the respondents on the ground when she attempted to take possession.

17. The Respondents, on the other hand, assert that they were all have been on that land for over 20 years and have been recognized as squatters fit for allocation of the land in issue.
18. The applicant has informed this court that she became the registered owner of the suit property sometime in 2022 through the process of allotment and grant by the Government of Kenya. In addition, that the suit property was registered in her name. The respondents on the other hand have taken the issue that they are entitled to the suit property by virtue of recognition as squatters by the defunct Municipal Council of Malindi and that they have been on the ground for over 20 years.
19. I am alive to the fact that the court is not required to make final findings of contested facts but to weigh the relative strength of the parties' cases. The principle was considered and Lord Diplock made the following observation in *American Cyanamid Co V Ethicon Limited* (1975) 1 ALL ER 504; (1975) AC 396 HL at 510.

“It is no part of the Court's function at this stage of the litigation to try and resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial.”

20. I have two warring scenarios in this matter – what Kenyans say kwa ground vitu ni tofauti (on the ground things are different) - that of the applicant who is the registered owner of the property in contestation and the claim by the respondents that they have been living on the piece of land uninterrupted for a period of over 20 years with a recognition as squatters by the defunct Municipal Council of Malindi and had been authorized to build and pay ground rates, annual rent, land rates and other charges as per the annexed receipts in reply to the notice of motion. Photographs attached to the pleadings and responses by the respondents show that they are settled on the suit property and have carried out extensive development.
21. At the end of the day, what the court needs to balance at this stage is the rights of the two wrangling parties as claimed to await a full and final determination of the matter. The preservation of the substratum of the subject matter or status quo orders as held by the Court of Appeal in the case of *Mwadzaya Wachanda Clan Welfare Registered Trustees & 58 others v Petro Oil Kenya Ltd & 6 others* (Civil Application E055 of 2021) [2022] KECA 402 (KLR) the Court of Appeal in granting temporary orders of stay of execution to preserve the substratum of a suit property stated as follows:

“We have considered the arguments and submissions canvassed by the Applicants and 1st Respondent. Mr Gikandi has raised the preliminary issue of this Court's jurisdiction to grant the orders sought. It is notable in this regard that the Court's powers and discretion under Rule 5 (2)(b) is wide and this Court can order a stay of execution, injunction, or stay of further proceedings on such terms as the Court deems just. *Status quo* orders preserve the subject matter of litigation pending the hearing of a suit or appeal, and are therefore a species of stay orders and fall within the ambit of Rule 5(2)(b). The power of this Court to grant status quo orders has been recognised in various decisions, including in the cases of *Kolongei Farmers Co-operative Society Ltd vs Tom Kevolwe Anzingale & 6 others* [2005] eKLR and *Rhoda Mukuma vs John Abuoga* [1988] eKLR. The powers of this Court in this respect include specifying the terms and extent of the *status quo* orders.



13. In this regard, the principles applicable in the exercise of the Court’s unfettered discretion under Rule 5(2) (b) to grant an order of stay are well settled. Firstly, an Applicant has to satisfy that he or she has an arguable appeal. Secondly, an Applicant has to demonstrate that unless an order of stay is granted the appeal or intended appeal would be rendered nugatory. These principles have been restated and amplified by this Court in *Stanley Kangethe Kinyanjui vs Tony Ketter & 5 others* [2013] eKLR.
14. The Applicants herein have referred the Court to their memorandum of appeal and the grounds of its appeal therein to demonstrate that it has an arguable appeal. The Applicants have in their grounds faulted the ELC on the application of the doctrine of *res judicata*, which we find arguable and ought to be canvassed fully. The Applicants’ appeal is therefore not frivolous. The first limb of arguability has therefore been satisfied. On the nugatory aspect, it was stated by this Court in *Reliance Bank Limited vs Norlake Investments Ltd* [2002] 1 EA 227, that “the term ‘nugatory’ has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling.” See also *Stanley Kangethe Kinyanjui vs Tony Ketter & 5 others* [*supra*] wherein it was held, *inter alia*, that whether or not an appeal will be rendered nugatory depends on whether the status of the subject matter sought to be stayed is reversible; or if not reversible whether damages will be an adequate remedy for the party aggrieved.
15. It is notable that the 1st Respondent does not dispute that the Applicants are in occupation of the property which was the subject of the ruling in Malindi ELC Case No E063 of 2020, namely Kilifi/Madzimbani/Mitangoni/835 and 841. In the circumstances it is our view that the appeal will be rendered nugatory, if the current status quo with regard to possession and the status of the title to the suit property is disturbed before the determination of the Applicants’ appeal.”
22. Pursuant to the Environment and Land Court Practice Directions 2014, this court has been granting *status quo* orders to preserve the subject matter pending full determination of the suit see for example Onguto J. in *Thugi River Estate Limited & Another v National Bank of Kenya Limited & 3 others* [2015] eKLR:

“In land matters the maintenance of status quo order is now literally synonymous with the proceedings. As was held by the Court of Appeal in the case of *Mugah v Kunga* [1988] KLR 748, in land matters status quo orders should always be issued for purposes of preserving the subject matter. This court’s practice directions vide Gazette Notice No 5178/2014 have followed suit. Practice Direction No 28(k) is relatively clear. It gives the court the leeway and discretion to make an order for *status quo* to be maintained until determination of the case. I however take note that the Gazette Notice was issued before this court’s July, 16th 2014 decision.

The end result is that status quo orders will issue not just when the court is prompted by way of formal applications for injunction or conservatory or stay orders: see *Texaco Ltd v Mulbery Ltd* [1972]1 WLR 814, but also when the court is of the view that as a case



management strategy, it would be more proportionate and appropriate without prejudicing one party but both, to issue a “*status quo*” order.”

23. Whereas the applicant had sought injunctive orders at this stage which orders differ from those of *status quo* to my mind the situation I have commends for issuance of status quo orders and therefore the instant application succeeds to that extent and I hereby issue the following orders :
- a. That the Notice of Motion application dated November 28, 2022 partially succeeds only to the extent that status quo to be maintained on the suit property that is Plot No 111 (CR 80759) (Orig Plot No 61) measuring 0.1403 hectares meaning there shall be no transaction whatsoever including but not limited to alienation, charging, mortgaging, leasing or transferring of proprietary interest of the suit property until this matter is heard and determined;
 - b. That there shall be no eviction of any party from the suit property;
 - c. That there shall be no further constructions or development by the Defendant on the suit property and any constructions by the Defendants that is ongoing on the suit property to forthwith cease.
 - d. That there shall be maintained peace and tranquility by all the parties and their agents at the suit land at all times during the pendency of this suit until it is heard and determined.
 - e. At this stage the court encourages the parties to consider alternative modes of dispute resolutions either by Court Annexed Mediation or Alternative Justice System
 - f. That costs to be in the cause.

DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY IN OPEN COURT ON THIS 11TH DAY OF MAY 2023.

E. K. MAKORI

JUDGE

In the Presence of: -

M/s Muisyo for the Plaintiff/Applicant

M/s Minyazi for the Defendant/Respondent

Court Clerk: Happy

