



**Nyabuoro v Adera & another (Environment and Land Appeal
E008 of 2023) [2023] KEELC 22179 (KLR) (14 December 2023) (Ruling)**

Neutral citation: [2023] KEELC 22179 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIRONMENT AND LAND APPEAL E008 OF 2023
AY KOROSS, J
DECEMBER 14, 2023**

BETWEEN

PAULO AUMA NYABUORO APPELLANT

AND

JENIFA ADHIAMBO ADERA 1ST RESPONDENT

SILAS ODHIAMBO ONYANGO 2ND RESPONDENT

RULING

Appellant's Case

1. This ruling seeks to determine the Notice of Motion dated 2/10/2023 filed by the Appellant in which he prays for several reliefs some of which are spent and the substantive prayers to be determined are: -
 - a. That pending the hearing and determination of the appeal arising from the judgment in Madiany Principal Magistrate's ELC Case No.E002 of 2023, an order of status quo be issued as regards to a portion of all that property known as Siaya/Ramba/1974 measuring approximately 0.5 Ha which the Appellant is claiming under the doctrine of customary trust.
 - b. That pending determination of the appeal, an order of injunction do issue restraining the 2nd Respondent, his servants, agents, employees, relatives, heirs, assigns, holders of power of attorney, representatives and/or persons claiming through him by virtue of any written law from alienating, transferring, charging, selling, disposing of or in any manner whatsoever interfering with a portion of all that property known as Siaya/Ramba/1974 measuring approximately 0.5 Ha which the Appellant claims under customary trust.
 - c. Costs of the application.



2. The Motion is supported by grounds particularised on its face together with averments contained in the Appellant's Affidavit sworn on even date. From it, the Appellant asserts he is aggrieved by the decision of the Trial Magistrate and has lodged an Appeal to this Court.
3. Further, he contends the appeal has high chances of success and that the 2nd Respondent has since moved into the portion in dispute and interfered with his farming activities. Further, he avers the 2nd Respondent intends to dispose of the entire land known as Siaya/Ramba/1974 (suit property) to his detriment thus rendering the Appeal nugatory. It is the Appellant's position it is in the interest of justice if the Motion is allowed.

The 1st Respondent's Case

4. In opposition to the averments, the 1st Respondent filed a Replying Affidavit which she swore on 16/10/2023. Therein, she avers she is the rightful owner of Siaya/Ramba/1940 and contends she has sold a portion of it to the 2nd Respondent and asserts persons whom she described as Andrea's sons had a right to this property too. She avers the Motion should be dismissed with costs.

2nd Respondent's case

5. In the same manner, the 2nd Respondent opposed the Motion by filing a Replying Affidavit deposed on 16/10/2023 where he asserts he purchased a portion of Siaya/Ramba/1974 from the 1st Respondent and Andrea's sons were also in occupation and he intends to transmit a portion to them. Further, the 2nd Respondent Urges this Court to dismiss the Motion.

Parties' Submissions

6. As directed by the Court, the Motion is canvassed by written submissions. The firm of M/s. Otieno Asewe & Co. Advocates filed written submissions dated 5/10/2023. Counsel identifies the issue for determination as whether the prayers sought should be granted. However, the Respondents' Counsel M/s Dola Magani & Co. Adv. did not file any submissions.
7. Counsel submits the 2nd Respondent has since taken possession of the disputed portion and the Appellant risks suffering substantial loss especially if the 2nd Respondent continued interfering with the disputed portion. Counsel submits the appeal would be rendered nugatory if the order of *status quo* is not granted. Counsel relies on the case of *Fatuma Abdi Jillo vs. Kuro Lengesen & another* [2021] eKLR which cited *Kenya Airline Pilots Association (KALPA) vs. Co-operative Bank of Kenya Limited & another* [2020] eKLR where the essence of a *status quo* order was explained as follows:

“...By maintaining the status quo, the court strives to safeguard the situation so that the substratum of the subject matter of the dispute before it is not so eroded or radically changed or that one of the parties before it is not so negatively prejudiced that the status quo ante cannot be restored thereby rendering nugatory its proposed decision.”
8. Further, Counsel urges the Court to exercise its discretionary power judiciously and relies on the settled principles of *Giella vs. Cassman Brown* [1973] EA 358. To bolster her position, Counsel relies on the decision of *Total Kenya Limited vs. Kenya Revenue Authority* [2013] eKLR where the Court of Appeal stated: -

“Indeed, it is settled that in inquiring whether the Applicant has an arguable appeal, even a solitary arguable point is sufficient.”



Issue For Determination, Analysis and Determination

9. I have carefully considered the Motion, Affidavits, Appellant's submissions and being guided by well-articulated case law, the solitary issue that warrants determination is whether the motion has merits.
10. First, it is important to note Section 13 (7) of the [Environment and Land Court Act](#) empowers this court to grant among other reliefs, preservation orders including injunctions.
11. As for injunctions pending Appeal, this Court derives its jurisdiction from Order 42 Rule 6 (6) of the *Civil Procedure Rules* which states:

“Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.”

12. While appreciating the definition of *status quo*, the decision of [Republic v National Environment Tribunal & Another](#) [2013] eKLR stated: -

“Therefore, 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 an existing factual scenario...”

13. The Court of Appeal in the case of [Director of Public Prosecutions v Justus Mwendwa Katbenge & 2 others](#) [2016] eKLR asserted the significance of injunctions thus: -

“Needless to emphasize, the remedy of temporary injunction is a vital tool intended to preserve the property in a dispute until legal rights and conflicting claims are established, so as to prevent the ends of justice from being defeated.”

14. In light of the fact that the principles of *status quo* and injunction are different, the Court can grant either or none at all. The essence of *status quo* and injunctions are that they protect the substratum of the subject matter in dispute before it is fundamentally distorted such that the *status quo* ante cannot be restored thus rendering the impending decision nugatory.

15. With that in mind, how can this Court decide whether to issue an order of *status quo* or an order of injunction? The case of Msa Misc Appln. (JR) No. 26 of 2010 *The Chairman Business Premises Tribunal at Mombasa Ex parte Baobab Beach Resort (Mbsa) Ltd* (UR) which is cited with approval in [Kenya Airline Pilots Association \(KALPA\) v Co-operative Bank of Kenya Limited](#) (*Supra*) stated that:

“In my view, an order to *status quo* to be maintained is different from an order of injunction both in terms of the principles for grant and the practical effect of each. While the latter is a substantive equitable remedy granted upon establishment of a right, or at interlocutory stage, a prima facie case, among other principles to be considered, the former is simply an ancillary order for the preservation of the situation as it exists in relation to pending proceedings before the hearing and determination thereof.

It does not depend on proof of right or prima facie case. In its effect, an injunction may compel the doing or restrain the doing of a certain act, such as, respectively, the



reinstatement of an evicted tenant or the eviction of the tenant in possession. An order for *status quo* merely leaves the situation or things as they stand pending the hearing of the reference or complaint. In its negative form, however, an injunction may have the same effect as an order for status quo.”

16. In the instant case, the current state of affairs as stated by the parties is that the suit property is registered in the name of the 2nd Respondent. The Appellant alleges he had planted crops on the disputed portion nevertheless, they were uprooted by the 2nd Respondent after he cordoned it off. It appears there are strangers on the suit property who are known as Andrea’s sons.
17. Therefore, bearing in mind the current state of affairs obtaining in the suit property and considering the Appellant’s alleged interest over the suit property is on customary trust which is an overriding interest, I am not satisfied the Appellant has met the ingredients of *Giella vs. Cassman Brown (Supra)* which are *prima facie* case with probability of success, irreparable injury and balance of convenience.
18. But, considering the circumstances of this case, having established the Appeal is arguable and there is a possibility the 2nd Respondent may subdivide the suit property for the benefit of Andrea’s sons, undoubtedly this will cause the Appellant tremendous hardship and the order which commends itself to be issued is that of *status quo* pending hearing and determination of the Appeal. Utmost I find and hold this limb of the relief sought is merited. Costs shall abide the outcome of the Appeal.
19. Ultimately, for the foregoing reasons and finding, I hereby issue the following disposal orders: -
 - a. That an order of status quo now obtaining in Siaya/Ramba/1974 do remain in force pending the hearing and determination of the intended appeal.
 - b. That the costs of this Motion will be costs in the Appeal.
 - c. That this matter shall be mentioned for directions on 6/03/2024.

DELIVERED AND DATED AT SIAYA THIS 14TH DAY OF DECEMBER 2023.

HON. A. Y. KOROSS

JUDGE

14/12/2023

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the Presence of:

Miss Oloo for the appellant

Mr. Indindis for the respondent

Court assistant: Ishmael Orwa

