



**Namakhuli & 3 others v Werunga (Environment & Land Case
E002 of 2023) [2023] KEELC 22106 (KLR) (5 December 2023) (Ruling)**

Neutral citation: [2023] KEELC 22106 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT & LAND CASE E002 OF 2023
EC CHERONO, J
DECEMBER 5, 2023**

BETWEEN

**ALUMINA NAMAKHULI 1ST PLAINTIFF
ELIZABETH NANJALA WANYAMA 2ND PLAINTIFF
PRISCILA ISISKA MCHEYWA 3RD PLAINTIFF
ALICE NANYAMA MCHWEYA 4TH PLAINTIFF**

AND

WENANI SIMIYU WERUNGA DEFENDANT

RULING

1. The application before me for determination is the Notice of Motion application filed under certificate of urgency dated 29th August, 2023. The said application seeks is for orders of status quo on land parcel Ndivisi/Makuselwa/406 and stay of execution of the judgment and/or decree in Webuye Pmcc Elc 6/2021 Simiyu Wenani Werunga Vs. Joyce Nasimiyu Wanyama pending the hearing and determination of this suit and costs. The application is opposed by the Respondent.
2. By way of a brief background, this suit was commenced by way of Originating Summons taken out pursuant to the provisions of Order 37 (7) of the *Civil Procedure Rules* and the *Limitation of Actions Act*, CAP 22, Laws of Kenya. The claim the applicants (plaintiffs) is for orders that they have acquired title by way of adverse possession to 6.4 Acres out of 8.1 Acres of land parcel Ndivisi/makuselwa/406 (“hereinafter referred to as the suit land”). It is their case that they are widows of one Wanyama Walusa Wambulwa who purchased the entire suit land from the Respondents father namely Wenani Werunga in the year 1969 for a consideration. They contend that the seller issued vacant possession of the land although a transfer of the property was not conducted and they have been in open, notorious, peaceful, continuous and uninterrupted use of the land for over 50 years and therefore have adversely acquired ownership of the suit land.



3. In the present application, the applicants state that the respondent sued Joyce Nasimiyu Wanyama who is the 1st wife of Wanyama Walusa Wambulwa-Deceased seeking to evict her from the suit land but parties therein entered into a consent judgment that allocated the respondent herein 3.1 Acres of the suit land while the said Joyce took up 5.0 Acres to the exclusion of the other 4 wives of the deceased.
4. They argue that the two colluded to deny them their rightful share of the suit property and if the said consented judgment is allowed to be effected, they shall be prejudiced. It is their argument that their claim in this Originating summons has a high chance of success and as such, this application ought to be allowed. They further averred in their supplementary affidavit sworn on 6th October,2023 that their originating summons is not *res judicata* since they were not parties to the suit filed in Webuye being Webuye PMCC ELC 6/2021.
5. After the court gave directions, the applicants through their Advocates on record filed their submissions dated 6th October,2023 and submitted that they have made out a case for granting of the orders sought. Counsel cited the provisions of Order 40 Rule 1 and the case of *Giella vs. Casman Brown*. The applicants further argued that they have established a *prima facie* case and unless the orders sought are granted, they would suffer irreparable loss.
6. The respondent who is acting in person opposed filed a replying affidavit in opposition to the application sworn on 13th September,2023 in which he averred that the suit land is registered in his name and his brothers namely John Juma Wenani, Baras Wenani, Wafula Wenani and Wamalwa Wenani. He argued that the suit land does not form part of the estate of Wanyama Walusa Wambulwa-deceased and that the Applicants occupation has never been peaceful and uninterrupted since the deceased sued Juma Wenani in the Land Dispute Tribunal in the year 2006.
7. The respondent further deposed that he sued Joyce Nasimiyu Wanyama as the next of kin and 1st widow of Wanyama Walusa Wambulwa-deceased in Webuye PMCC ELC 6/2021 and obtained a decree. He averred that the applicant's sons filed an application for stay of the decree in Webuye PMCC ELC 6/2021 and that seeking for the very orders in this application was a waste of judicial time. The respondent contends that the application is premature as the applicants lacked *locus standi* to institute this suit as they were not personal representatives of the deceased's estate and further that this suit is *res judicata* as a result of the Webuye PMCC ELC 6/2021 case.
8. The respondent filed submissions dated 30th October,2023 where he stated that the applicants lack the capacity to present this suit for failure to obtain letter of administration for the estate of the deceased. It was further submitted that the current application was a duplication of the case in Webuye PMCC ELC 6/2021 which the applicants were aware of and have not appealed against. Lastly, they stated that this suit is *res judicata* and it should not be entertained.
9. I have considered the application, the affidavit in opposition thereto and submissions by the respondent and in my view, the issues for determination are as follows;
 - a. Whether the applicants have *locus standi*.
 - b. Whether the order for *status quo* ought to be granted.
 - c. Whether stay of execution of the judgment and/or decree in Webuye Pmcc Elc 6/21 Simiyu Wenani Werunga Vs. Joyce Nasimiyu Wanjala ought to be issued.
 - d. Who bears the costs.
10. On the first issue, the respondent argues that the applicants lack *locus standi* to institute this claim for lack of letters of administration and/or *ad-litem* for the estate of Wanyama Walusa Wambulwa-



Deceased. The term *locus standi* is defined in the *Black's Law Dictionary, 9th Edition* at page 1026 as; "The right to bring an action or to be heard in a given forum". In the case of *Alfred Njau & Others vs City Council of Nairobi* (1982) KAR 229, the Court held that;

"the term *locus standi* means a right to appear in Court, and conversely, to say that a person has no *locus standi* means that he has no right to appear or be heard in such and such proceedings."

11. The Applicants have commenced this suit by way of originating summons claiming adverse possession. From the pleadings, the applicants averred that they first came into occupation of the suit land when their deceased husband purchased the same. They averred that thereafter, they occupied the land despite the status of ownership and registration. From my evaluation, this suit in my view is not one brought to protect or claim through the estate of Wanyama Walusaka Wambulwa (deceased), but one brought by the applicants in their own rights claiming to have acquired title by dispossessing the respondent as the registered owner for over a period of 12 years.
12. Based on that ground, I find that the applicants need not obtain letters of administration to institute the current suit and as such, the respondent's argument that the applicants lack capacity to institute this suit is defeated.
13. On the second and third issue, the applicant prays for status quo to be maintained and stay of execution of judgment and Decree in *Webuye Pmcc Elc 6/21 Simiyu Wenani Werunga Vs. Joyce Nasimiyu Wanjala*. It is the applicants' contention that they have been in possession of the suit land for over 50 years i.e. since 1969 and following the decree issued in *Webuye PMCC ELC 6/21*, they stand to be prejudiced and the substance of this matter shall be defeated once the respondents hive off the land in a survey said to have been scheduled for 1st September, 2023.
14. The Superior Courts have in numerous decisions attempted to define the contours of an order of status quo, when it ought to issue and the considerations that ought to guide the court in making the order. First, the *Black's Law Dictionary, Butter Worths 9th Edition*, defines *Status Quo* as a Latin word which means "the situation as it exists".
15. The purpose of an order of *status quo* has been reiterated in a number of decisions. The Court of Appeal in *Shimmers Plaza Limited v National Bank of Kenya Limited*, Nairobi Civil Application No. 38 of 2012 (UR 25/2012) pronounced itself on the meaning of *status quo* thus:

"Status quo" in normal English parlance means the present situation, the way things stand as at the time the order is made, the existing state of things. It cannot therefore relate to the past or future occurrences or events.
16. In *Kenya Airline Pilots Association (KALPA) Vs Co-operative Bank of Kenya Limited & another* [2020] eKLR, the purpose 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."
17. Apart from preserving the substratum of the subject matter, the court has also found an order of *status quo* as a case management strategy, where the court is keen to prevent prejudice as between the parties to



a matter pending the hearing and determination of the main suit. *Texaco Ltd Vs Mulberry Ltd* [1972]1 WLR 814,

“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, 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.”

18. As earlier mentioned, the suit land herein was the subject of controversy in *Webuye Pmcc Elc 6/21 Simiyu Wenani Werunga Vs. Joyce Nasimiyu Wanjala* and the parties therein entered into a consent judgment and subsequently a survey was scheduled for 1st September, 2023. The applicant has not told this Court in their supplementary affidavit which was sworn on 6th October, 2023 or otherwise what happened after the scheduled survey which was geared towards execution of the decree of the court in *Webuye*. I note that the applicant’s application is majorly pegged on the activities that would ensue upon the survey as scheduled and I find it strange that they evaded to update the court on the status of the property after the date of the scheduled survey. Therefore, this Court is at a loss as to what the status quo of the suit land is at this stage as the same cannot be clearly ascertained.

19. From the applicant’s submissions, I note that counsel urged for the grant of injunction orders where he proceeded to enumerate the grounds for granting orders of injunctions in support of the applicant’s application. *Murithi J in Boabab Beach Resort* as quoted by F. Tuiyot in the case of; *Saifudeen Abdullahi & 4 Others* in *Mombasa High Court Misc. Civil Cause No. 11 of 2012*, described the nature of a status quo order as follows:

“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.”

20. The case of *Thugi River Estate Limited & another Vs National Bank of Kenya Limited & 3 others* [2015] eKLR notes that a *status quo* order can be given by the court exercising its inherent jurisdiction. Further that the order need not necessarily be prayed for by the parties and in fact can be issued by the court *suo moto*.

“Firstly, an order of status quo will issue through a judicial process. Where the court in exercise of its general or statutory jurisdiction grants orders for maintenance in situ of a particular state or set of facts... the second or alternative order for status quo is the one issued by the court as a case management strategy. It is issued to provide assistance to the case. It also maintains a particular state of affairs or set of facts. Unlike a conservatory order or injunctive order, it is not descriptive. It is originated either by the court or by the consent of the parties. Often the court would not have been moved by either party. The court then expects an existing state of affairs or facts be preserved until a particular occurrence or until the courts’ further orders. It is intended to also freeze the state of affairs. State of affairs however do not



always remain static, so it is always crucial for the court to be very specific and neat in its description of what state of affairs is to be preserved.”

21. Therefore status quo orders are different from injunctions, meaning that the considerations to be established for grant of injunctions are not necessarily the same as those under status quo orders. The applicants therefore misguided themselves in their submissions by submitting on injunctive orders.
22. Back to the issues in question, the applicant prays for an order of stay of execution of the judgment in Webuye PMCC ELC 6/21. As rightfully noted in paragraph 5 of their supplementary affidavit, the applicants were not parties to that suit. The Court is guided by the definition of a party as stated in *Black's Law Dictionary 10th Edition* as follows:

“Those persons who institute actions for the recovery of their rights, or the redress of their wrongs, and those against whom the actions are instituted, are parties. The former are, in actions at common law, called plaintiffs, and the latter, defendants.”
23. Further, the current suit is not an appeal from the judgment/decree in Webuye SPMCC and it therefore goes without saying that a stranger to a case cannot agitate any action in it and that prayer therefore fails.
24. It is noteworthy that a claim for adverse possession is a fact to be observed upon the land and not to be seen in a title.
25. In the end, I find that the application dated 29th August, 2023 lacks merit and the same is hereby dismissed with costs.
26. Orders accordingly.

READ, DATED, DELIVERED and SIGNED at BUNGOMA this 5th day of December, 2023.

HON.E.C CHERONO

JUDGE

In the presence of;

Wamalwa R. H/B Were for the Applicants

Respondent in person-present

