



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ENVIRONMENTAL & LAND DIVISION
ELC CASE NO.525 OF 2013

THUGI RIVER ESTATE LIMITED.....1ST PLAINTIFF

PAUL MUITE.....2ND PLAINTIFF

-VERSUS-

NAITONAL BANK OF KENYA LIMITED.....1ST DEFENDANT

WA-GATHAGU LIMITED.....2ND DEFENDANT

THE REGISTRAR OF TITLES.....3RD DEFENDANT

SOUTH AND CENTRAL (THIKA) INVESTMENT LTD.....4TH DEFENDANT

RULING

Introduction

1. This case has evolved to give rise to the disquieting situation where the court is now called upon to vacate orders made by a judge of concurrent jurisdiction.
2. The Civil Procedure Rules anticipate that applications for review and revisits for purposes of vacating or setting aside orders are heard only by the Judge who made the earlier orders not facing satisfaction from the applicant except where the judge is unavailable to hear such applications. An application has been placed before me following the recusal by Lady Justice Nyambura Gacheru whose orders of 16th July, 2014 are partially the subject of challenge. The recusal was prompted by an application made by the 4th Defendant.

Facts

3. Briefly the facts and chronology of this case which are hardly in dispute may be stated as follows.
4. The 1st Plaintiff secured a loan from the 1st Defendant in 1997. The loan amount was Kshs. 23,184,915/= and USD 1,781,351. The security offered and pledged was all that property known

as LR No. 8747 Thika (“the suit property”) together with another property. A legal charge was formally executed and registered in favour of the 1st Defendant on 28th April, 1997. The 2nd Plaintiff who is a director of the 1st Plaintiff company guaranteed the loan. Another director Dr. Edith Muite who is not a party to these proceedings also guaranteed the loan. The 1st Plaintiff was apparently in default. The 1st Defendant moved to realize the security. Negotiations between the two parties proved fruitless and the 1st Defendant finally sold the property to the 2nd Defendant by way of private treaty.

5. Effectively, the Plaintiffs’ equity of redemption was extinguished but dissatisfied with all the happenings, the Plaintiffs moved to court to impeach the sale and transfer of the property to the 2nd Defendant. Such attempts failed. The Plaintiffs then sought to preserve the status quo then obtaining which was that the Plaintiffs were in possession. This court on 22nd October, 2008 dismissed the Plaintiffs application to injunct the 1st and 2nd Defendants. That was in High Court Civil Case No. 633 of 2004. Justice Kimaru rendered himself, as already stated on 22nd October, 2008.
6. Some five or so years later the Plaintiffs were back in court. They filed this suit. The Plaintiffs then challenged the sale to the 2nd Defendant on the basis that it lacked the requisite statutory consent and permission under the Land Control Act (Cap 302). The Plaintiffs also contended that the sale had been effected in complete violation of the doctrine of litigation *pendente lite*. The Plaintiffs sought to have the Sale Agreement and Transfer executed by the 1st Defendant as chargee declared null and void.
7. Alongside, the plaintiff the Plaintiffs filed an application seeking injunctive orders against the 1st, 2nd and 3rd Defendants to restrain the said Defendants from registering any transfer, charging, selling, advertising for sale or dealing in any manner whatsoever or howsoever with the suit property. The application was heard and finally determined on its merits on 16th July, 2014. In a reserved decision, the court found that the Plaintiffs equity of redemption had been extinguished.
8. The court (Gacheru J) stated as follows:

“It is my finding that the Sale Agreement entered into between the 1st and 2nd Defendants and subsequently, the 1st Defendant the purchasers were valid as they were entered when the 1st Defendant was exercising its power of sale and at that point, the Plaintiffs lost their right of redemption”.

The court then proceeded to conclude that it could not grant the Plaintiffs the declaratory orders sought that the Plaintiff’s equity of redemption had not been extinguished.

9. Further, the court also found that the Plaintiffs were not entitled to be favoured with the orders for injunction which they had sought as they had failed to establish a prima facie case.
10. The court then however proceeded to follow the Court of Appeal decision in **Ougo –v- Otieno [1987] KLR 1** to issue an order for status quo. The court made the following orders:

“1. That an order of status quo is hereby entered to the effect that there shall be no dealing with the suit property.

2. The status quo shall be in force for [a] duration of twelve (12) months from the date of this ruling within which time the Plaintiffs should set the matter down for hearing.

3. The parties herein to comply with the provisions of Order 11 of the Civil procedure Rules within 30 days from the date thereof.

4. Costs of the application shall be in the cause”.

11. In the meantime and all the while, the 4th Defendant on whose behalf, the documents filed in this case reveal, the suit property had been bought by the 2nd Defendant had been pursuing the registration of the transfer in its favour. The 4th Defendant had filed a judicial review application in JR Misc. Application No. 253 of 2012 which application was determined by Justice Odunga on 10th July, 2014. On 16th July, 2014 the transfer in favour of the 4th Defendant was finally registered. All the while the 4th Defendant was not a party to these proceedings.
12. Unable to take possession due to the status quo order the 4th Defendant quickly moved to court on 18th July, 2014 seeking to be enjoined to the proceedings. On 23rd July, 2014 the 4th Defendant was by the consent of all the parties enjoined as a party to this suit. Shortly after being impleaded, the 4th Defendant applied for the recusal of the judge who had been set to hear the 4th Defendant's application which sought orders to set aside, vary and or discharge the Court's orders of 16th July, 2014 as to status quo.

Submissions

13. The parties made their respective oral submissions before me on 24th March, 2015. Mr. Gathemia, advocating for the 4th Defendant, Mr. Gathemia was particularly critical of the judge's orders for status quo to be maintained. He submitted that the judge was well aware of the existence of the 4th Defendant yet proceeded to make orders affecting the 4th Defendant, in the absence of the 4th Defendant. Counsel was further of the view that having denied the Plaintiffs an injunction as had been sought, the judge had erred in thereafter issuing an order for maintenance of the status quo for one year. To Counsel that was an error apparent on the record. Counsel finally added that the status quo order had ensured that the 4th Defendant did not take possession and this had caused not just loss but also prejudice.
14. Counsel for the 1st Defendant, Mr. Wena supported the application for vacation and variation of the court order. Mr. Wena added that in granting the status quo order, the judge had basically granted an injunction which had earlier been found to be unmerited. Mr. Wena also added that the 1st Defendant faced the unfathomable risk of a claim in enormous damages whilst it is clear that the Plaintiffs are entitled to damages if they are finally vindicated at trial.
15. Mr. Mburu, counsel for the 2nd Defendant, also supported the application for vacation, setting aside or variation of the orders of 16th July, 2014. Stating that the 4th Defendant was prejudiced, Counsel submitted that the judge should have simply dismissed the application and nothing more.
16. For the Plaintiffs, the application was opposed. Reiterating the contents of the Replying Affidavit of the 2nd Plaintiff, sworn on 22nd October, 2014, Mr. Mureithi submitted that if any of the Defendants were unhappy with the court's decision of 16th July, 2014 they should have appealed. Counsel further submitted that the 4th Defendant was guilty of non-disclosure of the fact that the 4th Defendant was already in court with a judicial review application as the dispute herein raged between the Plaintiff on the one hand and the 1st through the 3rd Defendant on the other hand.

Analysis and Determination

17. I have little doubt that a court has an inherent jurisdiction to intervene at the instance of an interested party who until a court order is made was not originally a substantive party to the suit. The court of first instance may entertain an application for review by the same interested party affected by the court decision. Where he was not a party too, he may move the appellate court for

appropriate orders. The rationale is to ensure that parity is always preserved and justice meted out to all parties affected by court decisions. It can never be appropriate to lock out parties affected by court decisions from being heard on the basis that the court is *funtus officio*.

18. A proportionate and liberal reading of **Order 45 Rule 1** of the **Civil Procedure Rules** would lead to the irresistible inference that it is not only the substantive parties to the original decision who can seek a review of the decision. Any other party who did not participate in the proceedings leading to the decision sought to be reviewed. In this lot would be included interested parties as well as parties joined to proceedings as substantive defendants or plaintiffs after the fact. If they consider themselves aggrieved by the court's orders or decisions it would be appropriate for them to move the court for a review of the said order just the same way they could move an appellate court. In my view too, **Section 80** of the **Civil Procedure Act** is to same effect.
19. It is little wonder therefore that even the Court of Appeal rules recognize the fact that there may be parties with genuine grievances who need to participate on appeals filed before that court even though they were originally not parties to the suit. As was also held in the case of **Savings & Loans Kenya Ltd –v- Odongo [1987] KLR 294**, the very foundation upon which any judicial system rests is that any party who comes to court shall be heard fully and fairly.
20. Flowing from the above the 4th Defendant was entitled to choose between appealing the decision of 16th July, 2014 or seeking an order for the vacation/setting aside or variation thereof. As it were, the 4th Defendant chose the latter and the 4th Defendant cannot be faulted for making that choice.
21. The nature of the orders the 4th Defendant sought to have vacated set aside or varied also dictated in my view, that the court be moved by way of an application akin to review. The 4th Defendant seeks to vary and or have vacated an order for preservation of status quo. As I understand it, orders for status quo preservation are issued by the court in one of two forms.
22. 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. This is achieved through the issuance of formal prohibitory injunctive orders or through conservatory orders or stay orders. Such status quo orders do not extend to future circumstances however unlikely. "Status quo" in this respect, as maintained by an injunctive or conservatory or stay order, is the then existing state of affairs. Often the order is very specific and descriptive in such instances and parties are expected, nay bound, to observe the order. The order will often be issued after a balance of all the factors and circumstances. As was stated by **Lord Diplock in American Cyanid Co.–v- Ethicon [1975] 1 All ER 504 at 511**

“where factors appear to be evenly balanced, it is a counsel of prudence to take such measures as are calculated to preserve the status quo.....”
23. 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. Ordinarily where it is the court that has prompted a status quo order or has prompted the parties to it, it is more appropriate and exceedingly relevant to describe clearly the state of affairs at the time the order for status quo is issued. It is undesirable to simply make an order of status quo to be maintained without clearly describing the state of affairs then existing and being preserved. Assistance of the counsel should always be sought in such instances otherwise each party may

walk away with its own state of affairs in mind.

24. It is certainly worth pointing out that as such status quo orders are prompted by the court to assist in case management, the court must always keep an eye on the fundamentals. Firstly, when it is of no assistance there is no need to invoke it. There must be gain in its imposition. It would therefore be important for the court to know and precisely describe the state of affairs being kept *in situ*.
25. Secondly, the court must ensure no conflict or combat is generated by the order for maintenance of status quo. Its effect is everything for the court. It should create no prejudice to one party, nor hardship to one party. There should be equality in the prejudice, some sort of rigid yet false equality. Both or all the parties should have a feel that neither is disadvantaged by the order. This once again calls for a clear description of the state of affairs being preserved or maintained. That way the court is also able to ascertain and balance the levels of prejudice or hardship if any.
26. 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.
27. 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.
28. The question in the instant case would be whether there is sufficient reason to interfere with the order of the court made on 16th July, 2014. The Defendants say there is. The main basis is that having made findings which led to the irresistible conclusion that an injunction could not be issued in favour of the Plaintiffs, the court then could only dismiss the injunction application. The Defendants also state that the court having been very alive to the fact that there was another party in the form of a purchaser from the 2nd Defendant, orders affecting such party’s interest ought not have been made.
29. I would agree with the Defendants when they all submit that the court’s analysis of facts should only have led to a singular conclusion, that of the dismissal of the application for injunction. As I have pointed out however a court has jurisdiction to make orders for status quo in the realm of case management. That is what the court did. That exactly is why the court even further directed that the suit be fixed for trial within twelve months. That too is why the court directed that all parties were to comply with pretrial requirements within thirty (30) days. I am in the circumstances unable to perceive a dismissal of an injunction application to amount to a rebuff of the jurisdiction of the court to ensure that a case is properly managed with the overriding objective in mind.
30. The Defendants, especially the 4th Defendant, however stand in good stead when they argue that the court did not consider the prejudice or hardship the order for status quo could cause to either of the parties. It is apparent on the face of the record that the court did not keep an eye on the fundamentals. In management of cases, a court must as it issues pretrial directions and procedures aim at not only a quick resolution of the dispute but also ensure that neither party is unnecessarily prejudiced or put to hardship. The court ought to seek to attain that false yet rigid equality between the parties.
31. In the instant case, the court vindicated the sale to the 2nd Defendant by the first. The court also

vindicated the sale by the 2nd Defendant to the 4th Defendant, whom the court referred to as the purchaser. The court was aware of and alive to the 4th Defendant's existence. Caution ought to have been exercised whilst ordering a preservation of the status quo. Such caution would have led to a clearer and better definition of the state of affairs. Such caution would have ensured that no party was prejudiced. For that reason alone, I would interfere with the orders for status quo made on 16th July, 2014. It is also apparent that the court contrary to established norms on case management did not involve or invite the parties' contribution.

32. I have indicated that the court was entitled to make an order for status quo. However, such orders are not to be in a vacuum. The court should have ensured that there was a clear description of the status quo being maintained. I would therefore interfere in a limited manner by clearly defining the status quo. I would however not vacate the order for status quo in its entirety as it was made in the course or process of case management. I would ensure that such orders are intact but with appropriate variation to ensure that the state of affairs as at 16th July, 2014 is kept *in situ* and intact.

33. Records before the court reveal that as of 10th July, 2014 the court (Odunga J) had directed that the suit property be registered in favour of the 4th Defendant. The registration was effected on 16th July, 2014. That was the state of affairs as the court made its order. The Plaintiffs too were still in possession. That too was part of the state of affairs.

34. The circumstances of this case call for this court to act and ensure that the vehicle of administration of justice continues to run fairly. I consequently allow the application by the 4th Defendant to the extent that it seeks a variation of the orders of 16th July, 2014. The court orders of 16th July, 2014 will be varied by vacating the same and substituting the following orders.

- i. There will be an order of status quo to be maintained by all the parties it being understood that the state of affairs is that the 4th Defendant is the registered proprietor of the suit property whilst the Plaintiffs are still in possession of the property.
- ii. Such status quo is to be maintained by all parties until the 15th day of July, 2015 by which date the Plaintiffs should have set down the suit herein for hearing.
- iii. All the parties to comply with the provisions of Order 11 of the Civil Procedure Rules within the next 30 days.
- iv. The costs of the application dated 6th May, 2013 shall be in the cause.
- v. There shall be liberty to apply.

35. The costs of the application dated 18th July, 2014 will abide the trial and outcome of the suit.

36. Orders accordingly.

Dated, signed and delivered at Nairobi this 20th day of April, 2015.

J. L. ONGUTO

JUDGE

In the presence of:-

..... **for the Plaintiff/Applicant**

..... **for the Defendants/Respondent**