



COPY

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
HIGH COURT CASE NO. 632 OF 2011

1. HAMISI TSUMA MWERO & 16 OTHERSPLAINTIFFS/APPLICANTS

- V E R S U S -

COLIFAX HOLDINGS LIMITED1ST DEFENDANT/RESPONDENT

COUNTY COUNCIL OF KWALE2ND DEFENDANT/RESPONDENT

RULING ON STATUS QUO

[1] A consent order was entered on 28th January, 2014 and it read as follows:

"By consent the orders on 28th January, 2014 are set aside. The status quo obtaining today shall be observed by all parties. Court to visit the scene on 21st March, from 9. a.m. The Deputy Registrar to make arrangements for travel and security."

Following this order parties to the suit have wanted the court to give an interpretation of *status quo*. For status quo to be understood in its proper context in this case, I have found it necessary to trace the brief history of this case.

[2] On 16th February, 2012 this matter came before my brother Muriithi J. An application that was for injunctive orders came before the court. The court order in as far as it is relevant to the injunctive orders stated;

"The second respondent to be served with the hearing notice. the first respondent undertakes not to demolish the applicants dwelling in the property , the Deputy Registrar of the court to visit the site in the company of the parties advocates on date to be appointed by the parties and report before the next hearing date."

[3] On 28th February, 2012 the matter came before Kasango J. Mr.Tindi for the applicants tried to have his application heard before directions. He stated that the urgency was that construction by the 1st defendant was going on. He said that the respondents were covering crops in the area. That there was a water catchment which is restricted to his clients. He referred to the Deputy Registrar's report. The court,

Kasango J, held that what was termed by the applicants as being urgent was taking place in December 2011. The court declined to certify the application urgent and ordered it to be served.

[4] On 27th March, 2013 this matter came up again in court on a Preliminary Objection by Mr. Khagram. After lengthy arguments by the parties and before Mr. Khagrams' Preliminary Objection was dismissed by the court the court stated;

"On undertaking of Mr.Khagram on behalf of the 1st respondent, the dwelling houses of the applicant that are on the ground today shall remain until further orders of the court. The court orders the applicants not to intimidate the 1st applicant, their servants or their agents".

On 27th June, 2012, the court further ordered the application dated 14th December 2011, 27th February 2012 and 25th June 2012 to be heard together.

[5] On 23rd October, 2012 this matter came before my brother Tuiyot J. Mr. Khagram, Miss. Wanjeri, Ms. Mabeya and Mr. Tindi were all present and were prepared to proceed. The court said,

"After talking to parties it is agreed as follows:

- 1. The originating summons dated 08th December, 2011 be heard by way of viva voce evidence.*
- 2. All affidavits filed in respect to all applications herein shall be deemed as pleadings.*
- 3. The interim orders subsisting are hereby extended up to the hearings till determination of the originating summons but with a right to any party to apply.*
- 4. Hearing of the Originating Summons on 6th December, 2012."*

[6] On 28th January, 2014 Mr. Tindi brought an application under certificate of urgency under vacation rules. This application was heard by Odero J as the duty judge when I was on vacation and various orders were granted on interim basis that affected the respondents in the Originating Summons. These orders were set aside by consent of the partes on 11th March, 2014.

[7] As can be seen from the history of the case that I have set out herein, there has been no injunctive orders ever given in this case against the respondents in the originating summons. What has been in place and is still in place is Mr. Khagrams undertaking not to demolish the applicants dwellings on the suit premises. The applications that were in place prior to 11th March 2014, when I made an order for status quo were themselves subsumed by the pleadings herein vide the consent assented to by the parties through their advocates on 23rd October, 2012 before Tuiyot J. The court record containing the consent was signed by Mr. Khagram, Miss. Wanjeri, Ms. Mabeya and Mr. Tindi on the said day.

[8] The status quo pertaining on 11th March, 2014 was that the applicants dwellings in the suit premises were not to be demolished. The dwellings were protected by Mr.Khagrams undertaking only. The respondents were not estopped from proceeding with their construction. Infact, the court; Kasango J, found that construction started in December 2011 and she refused to certify the application for injunction urgent. When I visited the scene with the parties and their advocates, we saw seven dwellings still in the suit land and still standing but were surrounded by deep excavations. Most of the other homesteads were outside the suit premises. Indeed the house of Hamisi Tsuma Mwero the first applicant is outside the suit premises and we were all taken there and we saw it from afar.

[9] he last issue on status quo is that, other than Mr. Waithera's clients application, which was filed after the consent order of 11th March, 2014, this originating summons is ready for hearing, all applications filed before 11th March, 2014 having been subsumed by the pleadings by consent of the parties and directions having been taken on the same before Tuiyot J. I, therefore find nothing preventing the respondents from proceeding with their construction. It is worthy of note that this court cannot at this stage injunct what has been done or was done as early as December 2011 and when there is no application

asking the court to do so. The parties are advised to fix this suit for hearing on priority basis.

Dated and delivered in open court at Mombasa this 3rd day of April, 2014.

S.MUKUNYA

JUDGE

In the presence of:

Mr. Tindi Advocate for the plaintiffs

Mr. Lumatete Advocate for 2nd defendant

Mr. Khagram Advocate for 1st defendant

Mr. Waithera Advocate for 5th, 8th, 9th and 17th applicants