



REPUBLIC OF KENYA

HIGH COURT AT NAIROBI (NAIROBI LAW COURTS)

ENVIRONMENTAL & LAND CASE 61 OF 2013

NAIROBI BUSINESS PARK LIMITED.....1ST PLAINTIFF

ACTISNBPL HOUSING (MAURITIUS) LIMITED.....2ND PLAINTIFF

VERSUS

KENYA FORESTRY SERVICE.....DEFENDANT

RULING

Coming up before me for determination is the Notice of Motion dated 18/4/13 brought under the provisions of Order 40 Rule 7 of the Civil Procedure Rules, 2010 and Section 1A, 1B and 3A of the Civil Procedure Act, 2010. It seeks the following orders:

1. Spent
2. That this honourable court be pleased to stay execution of its order No. 3 of the orders made by this honourable Court on 11/4/13 directing that:- “ Let all parties maintain the *status quo*, specifically let all construction activities on the Suit Property be suspended pending the hearing and full determination of this suit” pending the hearing and determination of this application.
3. That this honourable court be pleased to set aside its order No. 3 of the orders made by this honourable on 11/4/13 directing that “Let all parties maintain the *status quo*, specifically let all construction activities on the Suit Property be suspended pending the hearing and full determination of this suit” and all consequential orders made thereon and steps taken pursuant thereto be reversed.
4. That the costs of and occasioned by this Application be borne by the Applicant in any event.

The application is premised on the grounds appearing on the face of the application and the supporting Affidavit of Martin Koome Gikunda in which he stated that following an unlawful invasion and occupation of the 1st Plaintiff’s property known as Land Reference Number 24861/1 (hereinafter referred to as the “Suit Property”) by armed officers employed by the Defendant, the Plaintiffs instituted these proceedings against the Defendant seeking reliefs more particularly set out on the Plaint dated 9/1/13.

He further swore that simultaneously with the filing of the aforementioned plaint, the Plaintiffs lodged an application under Certificate of Urgency seeking injunctive relief as more particularly set out in the Notice of Motion dated 9/1/13 (hereinafter referred to as “the Injunction Application”). He further stated that the Injunction Application was heard *ex parte* by Ogola, J. and interim injunctive orders granted. He

further indicated that the Injunction Application was fixed for Interpartes hearing on 22/1/13.

He further swore that the Defendant is blatant defiance of the orders issued by this Honourable Court (Ogola, J.) on 10/1/13, continued to illegally occupy the 1st and 2nd Plaintiffs' parcel of land known as Land Reference 24861/1 and 24861/2 therefore by a Notice of Motion application dated 22/1/13, the Plaintiff moved this Honourable Court to have the Defendant's Director David K. Mbugua cited and committed to jail for contempt of this Honourable Court. ("the Contempt Application"). He further swore that the contempt Application was certified as urgent and fixed for hearing on 4/2/13. He further stated that when the Contempt Application came up for hearing on 4/2/13 before Nyamweya, J, the Defendant sought an adjournment on the basis that it wished to pursue alternative dispute resolution. He swore that her Ladyship adjourned the hearing of the contempt Application to 4/4/13. He further stated that thereafter the Plaintiff's advocates by letters dated 12/2/13 and 13/3/13 wrote to the Defendant's advocates seeking their proposal for an amicable settlement which letters elicited no response. He further averred that on 13/3/13, the Defendant lodged an application under a Certificate of Urgency by way of Notice of Motion dated 13/3/13 seeking various orders including the setting aside of the interim injunctive orders made by this honourable court on 10/1/13 (the "Defendant's Setting Aside Application"). He further stated that the Defendant's setting aside Application came up for hearing on 28/3/13 before Gitumbi, J, when the Plaintiffs objected to its hearing. He further swore that after hearing Counsels for both parties, her Ladyship gave a mention date on 11/4/13 to give directions on which application would be heard first out of the three pending applications. He further swore that on 11/4/13 the court ruled that the Contempt Application be heard first. He further stated that after hearing Counsel for the Defendant making submissions from the bar that the Plaintiff's construction on the Suit Property had been accelerated, Gitumbi, J made the following orders:-

- i. The Contempt Application shall be heard on 2/5/2013
- ii. Interim Orders are extended to that date
- iii. Let all parties maintain the *status quo*, specifically let all the construction activities on the Suit Property be suspended pending hearing and full determination of this suit.

He further swore that following the orders issued by this Honourable Court (Gitumbi, J.) on 11/4/13, the Plaintiff ceased construction on the Suit Property and that on the foot of those orders armed guards belonging to the Defendant trespassed on the Suit Property on 12/4/13 and continue to occupy the Suit Property harassing the Plaintiffs' Security personnel on site. He further swore that as a consequence of the said cessation of construction, the Plaintiffs are incurring heavy losses estimated at Ksh. 1 million per week being standby for construction and Ksh. 5 million loss in expected rental revenue due to delay in completion of the Nairobi Business Park Phase II Project.

The Application is contested. The Defendant filed its Replying Affidavit sworn by David K. Mbugua on 25/4/13 in which he swore that the Plaintiff filed this suit on 10/1/13 and obtained an exparte injunction stopping the Defendant from exercising its statutory duties of preserving and protecting forest land. He further swore that subsequent thereto, the Plaintiffs resumed and accelerated construction on the disputed Suit land with the single purpose of completing construction before the suit is heard and thus render the entire suit an academic exercise. He further swore that when the matter came up for hearing on 24/1/13 the Applicants who were enjoying the fruits of an exparte injunction objected to the hearing of the injunction Application dated 9/1/13 and instead elected to prosecute their Contempt Application merely to continue enjoying the fruits of the exparte injunction. He further swore that in order to protect the degeneration of the environment he instructed his Advocates to file an application to set aside the injunction application which was filed on 13/3/13 and had it fixed for hearing on 28/3/13. He further swore that on the said hearing date of 28/3/13, the Plaintiff's advocates again enjoying the exparte injunction strongly objected to the hearing of their said Application prompting the court to direct that it needed to consider all orders already made in the file before giving directions on the way forward. He further stated that on 11/4/13 when the matter came up for directions the Honourable Court directed that:

- a) The Contempt Application shall be heard on 2/5/13

b) The interim orders are extended to 2/5/13

c) All parties do maintain status quo specifically all construction activities on the Suit Property be and are hereby suspended pending the hearing and full determination of the Suit.

He further swore that such directions angered the Plaintiff's advocates who immediately informed the Honourable Court they intended to appeal against the said directions and that despite the Plaintiffs having been granted leave to appeal, they never filed an appeal as threatened. He further averred that despite the said directions, he was informed that the Plaintiff had on 18/4/13 filed a fresh application to be allowed to resume construction which is clearly intended to defeat the outcome of this suit. He further stated that the suit land is a gazetted forest which has never been degazetted and any further construction on the said gazetted land will render null the constitutional requirement of attaining 10% forest cover in the country and the order of status quo is fair and reasonable.

Both Counsels for the Plaintiffs and the Defendant made their oral submissions in court on 13/5/13. Counsel for the Plaintiff challenged the orders made on 11/4/13 on 3 grounds namely.

a) Jurisdiction

He argued that the matter having been fixed for a mention on 11/4/13, the Court had no jurisdiction to make substantive orders such as the one made which is disputed. He cited the case of **Central bank of Kenya v. Uhuru Highway Development Limited (Civil Appeal No. 75 of 1998)** and the case of **Rahab Wanjiru Evans v. Esso Kenya Limited (Civil Appeal No. 13 of 1995)**. He argued that on this basis alone, the status quo order should be set aside.

b) Misrepresentation

He made the argument that the title being relied on by the Defendant was not valid and that the correct title was the one annexed to their Replying Affidavit

c) Conflict with Pre-existing Order.

He submitted that the *status quo* order completely undermined the effect and purpose of the exparte injunction being enjoyed by the Plaintiff.

Counsel for the Defendant made the following submissions:-

1) The Court is *functus officio* in as far as the directive of *status quo* is concerned.

2) Any party aggrieved by the *status quo* order is at liberty to appeal against the order. He stated that Counsel for the Plaintiff was given leave to appeal against the order and that he should proceed to the Court of Appeal. Counsel argued that this court could not sit in an appellate capacity in respect of its own order.

3) Both parties were accorded an opportunity to make presentations before the court made its *status quo* order.

4) That the plaintiffs failed to make full material disclosure to the court. Specifically in respect to annexures to its Supporting Affidavit wherein they did not attach all copies of the title documents being relied upon by them.

5) The allegation that Grant No. 70244 had been surrendered to the Government was untrue.

At the heart of the Plaintiff's application dated 18/4/13 is the order issued by this court on 11/4/13 hereinbefore referred to as the "*status quo* order" in which the court states as follows:

“ Let all parties maintain the status quo, specifically let all the construction activities on the Suit Property be suspended pending the hearing and full determination of this suit”

On this issue, the Plaintiff made their position known as cited above. On the court lacking jurisdiction to make a substantive order during a mention, the court agrees with the Plaintiffs that this is indeed the correct position in law. In the case of **Rahab Wanjiru Evans v. Esso Kenya Limited** cited by the Plaintiffs, it was stated as follows:

“We have no doubt that where a matter is fixed for mention, as it was in this case, the learned Judge had no business determining on that date the substantive issues in the matter. He can only do so, which was not the case here, if the parties so agree”

This court accepts this position.

On the issue that the Defendants obtained the *status quo* order on the back of misrepresenting to this court that it was the title holder of the Suit Property, this court rules that this was not the driving factor to the determination made.

On the issue of the *status quo* order being in conflict with pre-existing orders, this court confirms this position. Indeed, the court acknowledges that in extending the interim orders and at the same time issuing the *status quo* order, this court did in fact issue two conflicting orders. The court concedes having misdirected itself by failing to acquaint itself with the pre-existing orders prevailing at the time.

On the question of the Court being *functus officio*, this Court rejects this position on the strength of order 40 rule 7 which states as follows:-

“Any order for an injunction may be discharged, or varied, or set aside by the court on an application made thereto by any party dissatisfied with such order.”

It is on the strength of this provision that the Plaintiffs have approached the court for the setting aside of the *status quo* order which is in its very nature is an injunction.

As to the issue of appealing to the Court of Appeal, this court again affirms that the Plaintiffs had the option of coming back to this court to set aside the *status quo* order or filing an appeal at the Court of Appeal. They chose the former which was clearly within their right as cited above in order 40 Rule 7.

In conclusion, this court points out that there is pending in this matter the Injunction Application giving rise to the interim injunctive orders and the Defendant’s setting Aside Application, as well as other pending applications. These two pending applications are the applications that the court should hear to properly determine whether or not construction on the Suit Property should proceed during the hearing of this suit.

The court concedes that the *status quo* orders were not appropriate as the two cited applications were pending before this court.

Accordingly, in view of the foregoing, this Court hereby sets aside the *status quo* orders and directs that the pending applications herein be heard and determined. No order as to costs.

SIGNED AND DELIVERED AT NAIROBI ON THE 31ST DAY OF MAY 2013

**MARY M. GITUMBI
JUDGE**