



**Sam Ventures (K) Limited v Ouko; Mburu (Intended Interested Party) (the Personal Representative of the estate of the late Edward Mburu Mugunyi t/a Mbugamu Enterprises) (Environment & Land Case 29 of 2020) [2022] KEELC 3353 (KLR) (11 May 2022) (Ruling)**

Neutral citation: [2022] KEELC 3353 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT & LAND CASE 29 OF 2020**

**A NYUKURI, J  
MAY 11, 2022**

**BETWEEN**

**SAM VENTURES (K) LIMITED ..... PLAINTIFF**

**AND**

**ODHIAMBO OUKO ..... DEFENDANT**

**AND**

**EVANCE MUGUNYI MBURU ..... INTENDED INTERESTED PARTY**

**THE PERSONAL REPRESENTATIVE OF THE ESTATE OF THE LATE  
EDWARD MBURU MUGUNYI T/A MBUGAMU ENTERPRISES**

**RULING**

**Introduction**

1. This ruling is in respect of four applications. The applications are dated June 2, 2020, June 4, 2020, July 20, 2020 and November 12, 2020. The applications dated June 2, 2020, June 4, 2020 and July 20, 2020 were filed by the intended interested party, while the application dated November 12, 2020 was filed by the defendant.

**Application Dated June 2, 2020**

2. In the application dated June 2, 2020, the intended interested party sought the following orders;
  - a) Spent
  - b) Spent
  - c) Spent



- d) That the honourable court be pleased to join the intended interested party or in such other capacity as the honourable court may deem fit.
  - e) That pending the hearing and determination of this suit the honourable court be pleased to discharge, vacate, review and or vary the orders given on March 19, 2020 and extended on May 13, 2020.
  - f) That the firm of Liko and Anam Advocates be disallowed from representing the plaintiff or any other party in this matter.
  - g) That costs of this application be provided for.
3. The application is supported by the grounds on its face together with the supporting affidavit of the applicant sworn on June 2, 2020, where he deposed that the estate of Edward Mburu Mugunyi t/a Mbugamu Enterprises is the lawful owner of parcel LR No 2358/9 situated in Mavoko in Machakos County (suit property); that interim orders issued to the Plaintiff were obtained by material non disclosure; that the defendant herein is a stranger and has no interest in the suit property; that Messrs Kipruto Kandie, Daniel Kianda Muthui, Pamela Bwari Onyambu and Florence Mauncho nor Royal Housing Cooperative Society Limited have genuine claim on the suit property; that the defendant does not exist and has been created for purposes of misleading the court; that the plaintiff relies on forged documents; that the Lands office and Survey of Kenya have confirmed that no titles, deed plans nor subdivisions have been issued for the suit property and that the firm of Liko & Anam Advocates was involved in preparing transfer documents in this matter and therefore they should be witnesses in this matter or parties in a criminal trial for perpetuating and or abetting crime involving the plaintiff's directors.
4. The application is opposed. The plaintiff filed a further affidavit sworn on October 14, 2020 where he deposed that he sued the defendant because he took part in the investigation done by the National Land Commission which filed its report dated March 11, 2020; that the existence of the defendant is not in doubt as he started sending the plaintiffs messages from September 1, 2020 by WhatsApp platform and shared the same documents relied upon by the intended interested party, and that the interested party is a hireling, holding brief for the defendant and trying to review orders made in the plaintiff's favour.

#### **Application dated June 4, 2020**

5. The application dated June 4, 2020 was filed by the intended interested party and sought for the following orders;
- a) Spent.
  - b) That the honourable court does reconsider the notice of motion application dated June 2, 2020 and issue prayers 2 and 3 of the notice of motion application by the intended interested party dated June 2, 2020.
  - c) That the honourable court be pleased to issue any other orders in the interest of justice.
  - d) That costs of this application be provided for.
6. The application was supported by the supporting affidavit of the applicant sworn on June 4, 2020, where he deposed that the interested party is in possession of the suit property; that the Plaintiff misrepresented to the Honourable court that they were in possession of the suit property; that the plaintiff intends to evict the Interested party and others on the suit property and that the plaintiff is



unlawfully expanding the scope of the court's order to include eviction, yet no eviction orders were issued by the court.

### **Application Dated July 20, 2020**

7. In the application dated July 20, 2020, the Intended Interested Party sought the following orders;
  - a) Spent.
  - b) Spent.
  - c) That the plaintiffs herein be barred from evicting, harassing and or in any way interfering with the applicant's use and enjoyment of the suit parcel of land.
  - d) That this honourable court be pleased to vary the orders issued on June 4, 2020 to give effect to its intention and to secure the interest of justice.
8. The application was premised on the applicant's supporting affidavit sworn on July 20, 2020, where he deposed that the plaintiff's agents have been delivering building materials on the suit land and have begun construction thereon; that this court clarified on June 4, 2020, that the order issued on April 24, 2020 was not an eviction order and that status quo could only be determined upon hearing the three applications filed; that there are material changes to the circumstances existing on June 4, 2020 to warrant issuance of conservatory orders in favour of the applicant; that the plaintiff is trying to change the status quo which effectively evicts the applicant from the suit property; that the plaintiff sued a defendant who had no interest in the land so as to obtain *ex parte* orders; that the plaintiff has not disclosed to court who is in occupation of the suit property; that the plaintiff's agents are known fraudsters.

### **Application Dated November 12, 2020**

9. In the application dated November 12, 2020, the defendant sought the following orders.
  - a) That this honourable court be pleased to set aside the mandatory orders issued on July 30, 2020 and specifically directing the defendant/ applicant to forthwith remove all structures, debris, construction stones, steel rods, building and other materials from LR No 2358/18.
  - b) That this honourable court be pleased to set aside the order dated July 30, 2020 restraining the defendant whether in person or through his agents from engaging in any activities on LR 2358/18.
  - c) That the honourable court be pleased to issue an order of status quo in respect to the suit property to be maintained.
  - d) That the honourable court be pleased to direct the OCS KBC Police station to stop interfering with the defendant/applicant's ownership and activities in LR number 2358/7 and 2358/8 and which do not form part of the suit property herein.
  - e) That the costs of this application be in the cause.
10. The application is supported by the supporting affidavit of the defendant/applicant sworn on November 12, 2020
11. The application is opposed. The plaintiff filed a replying affidavit sworn on March 24, 2021 and filed on even date where he deposed that the defendant was served by substituted service by advertisement on April 30, 2020 in the Daily Nation but failed to enter appearance; that the defendants demolished the



plaintiff's fence, although they have no structure on the suit land; that it is not true that the defendant was made aware of the suit by the police; that the defendant purported to sell a portion of the suit property to a third party and was subsequently arrested and that the applications herein by both the defendants and the interested party are meant to convolute this matter and bring confusion in the proceedings as the defendant and the interested party sells the suit property; that the defendant has not given evidence concerning the authenticity of his title; that both the interested party and the defendant allege to be in occupation of the suit property based on different ownership, yet none of them has made an adverse claim against another or contested the allegation of each other's occupation, which means they are acting in cahoots; that status quo should not be granted as it will create confusion; that defendant's identity card shows that he was born on May 10, 1986 yet the title he has annexed to his application commenced on August 1, 1990, which means he was registered as proprietor thereof when he was only four years old.

12. The applications were canvassed by way of written submissions, which were filed by the plaintiff on October 16, 2020 and December 2, 2021 and the intended interested party on July 27, 2020; which I have considered.

### **Analysis And Determination**

13. I have considered the applications, the responses and submissions. The issues that arise for determination are;
- a) Whether the intended interested party ought to be joined to this suit.
  - b) Whether the firm of Liko & Anam Advocates should be disallowed from representing the plaintiff.
  - c) Whether the orders made on July 30, 2020 should be set aside.
  - d) Whether the orders sought to direct the OCS KBC Police Station to stop interfering with LR Number 2358/7 and 2358/8 ought to be granted herein.
  - e) Whether an injunction should issue in favour of the Intended Interested party.
  - f) Whether the court should issue orders of *status quo*.
14. On whether the intended interested party ought to be joined to this suit, the applicant stated that he is in possession of the suit land and that the suit property is registered in the name of the estate of his father. I have looked at the grant of letters of administration issued to the intended interested party, the certificate of registration of business name for Edward Mburu Mugonyi and the letter of allotment in respect of the suit property issued to Mbugamu Enterprises. It appears that the Intended Interested party has an identifiable stake in the suit property. I therefore find and hold that he has an identifiable stake in this suit and he is therefore joined to this suit as an interested party.
15. The orders issued on March 19, 2020 were confirmed on July 30, 2020. The defendant has sought for setting aside of those orders on ground that he was not served with the application and only learnt of them from KBC police station. It is not in dispute that the defendant was served by substituted service by advertisement in the Daily Nation Newspaper. Therefore, the orders made on July 30, 2020 were regularly made. The plaintiff has alleged that the defendant contacted him via WhatsApp and tried to engage him over the matters herein. The factual allegations and accusations of fraud between the plaintiff and the defendant are so diametrically opposed that at this point, it is not useful to focus on the same. As the defendant was duly served, it is my view that he has not given sufficient reasons for setting aside the orders of 30<sup>th</sup> July 2020. The issues raised by the parties on who between them has a



genuine title go to the root of the case and will be addressed at the full trial and not at this stage. Suffice it to say that at the time the orders of July 30, 2020 were issued, the court was satisfied that the Plaintiff had made out a prima facie case with a probability of success.

16. The orders of June 4, 2020 were to the effect that status quo can only be ascertained after all the three applications on record are heard interpartes. Besides, in those orders, the court made a clarification that the order of April 24, 2020 was not an eviction order. The interested party has sought to vary the orders issued on June 4, 2020 allegedly to give effect to its intention and to secure the interest of justice. The reasons given are that the plaintiff is trying to change the *status quo* by placing construction materials and constructing on the suit property, which effectively evicts the applicant from the suit property.
17. In my considered view, the reason given by the applicant that the plaintiff intends to change the *status quo* is not sufficient reason to vary the orders of June 4, 2020. The fact that the interim injunction did not amount to eviction is factual as it can be clearly seen in the interim injunction. The other limb of the order was that the *status quo* will be ascertained upon determination of the three applications. That order was mainly clarifying the import of the interim injunction and giving directions and therefore I do not see any justification to interfere with the orders of June 4, 2020. In any event, the same have been spent upon determination of the applications herein.
18. Every party alleges to be in occupation of the suit property. While the defendants and the interested party seem not to be fighting each other, although each claim to have exclusive title to the property, the plaintiff insists that he is in occupation and that the other two parties are working in collusion to bring confusion and convolute issues in this suit. However, what is clear to me is that all the three parties in this suit have not been forthright on disclosing the status quo obtaining on the suit property. As the parties' allegations and counter allegations did not provide sufficient material to determine the status obtaining on the suit property, the prayer for *status quo* is unmeritorious. Both the interested party and the defendant seek for status quo orders. The plaintiff has objected to the same. As stated above, I do not find the justification to interfere with the orders made herein and substitute them with *status quo* orders. I will only add that there should be no evictions or further constructions on the suit property.
19. On the question as to whether the firm of Liko & Anam Advocates should be ordered to stop representing the plaintiff, the interested party has complained that the said firm was involved in the unlawful transfer of the suit property to the plaintiff and will be witnesses in this matter and or parties in criminal proceedings for perpetuating and or abetting crime involving the plaintiff's directors. As the issue as to whether the plaintiff's documents are a forgery as alleged by the interested party, is a matter that can only be determined at the trial and not by way of application, that ground cannot be the reason to stop that firm from representing the plaintiff. In any event the right to legal representation is a constitutional right and the plaintiff is entitled to choose advocates of their choice. This court cannot disallow the representation of that firm from representing the plaintiff as it did not in the first place allow that firm to represent the plaintiff. It is not the function of the court to choose which advocate to represent which party. On that ground, that prayer must fail.
20. On whether the orders sought to direct the OCS KBC Police Station to stop interfering with LR Number 2358/7 and 2358/8 should be granted, I note that the two parcels of land referred to are not subject of this suit. There are no pleadings in respect of the same in this matter. In the premises therefore, the orders sought are not tenable as this court's jurisdiction has not been seized in respect of the two properties.
21. The interested party has sought for orders that the plaintiff should be barred from evicting, harassing or in any way interfering with the interested party's use and enjoyment of the suit property. The interested



party is yet to file pleadings in this matter. He seeks to obtain injunctive orders against the plaintiff. It is trite law that for an injunction to issue, the applicant must have a *prima facie* case. The interested party is yet to file their pleadings and therefore yet to demonstrate a *prima facie* case. In addition, at this point, it would not be in the interest of justice to conclude that the suit property belongs to the interested party as that would be a premature pronouncement. In the premises, the said prayer is declined.

22. In the end, I make the following orders;

- a) The Intended interested party is joined to this suit as an interested party and granted 14 days to file and serve his pleadings together with witness statements and documents.
- b) Upon service, the plaintiff and defendant are granted 14 days to file and serve their pleadings, witness statements and documents in response to the interested party's pleadings.
- c) That the temporary injunction granted to the plaintiff on July 30, 2020 remains in force but the same does not amount to eviction orders.
- d) That none of the parties shall further construct on, or dispose of, the suit property, pending hearing and determination of this suit.

23. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 11<sup>TH</sup> DAY OF MAY 2022 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM**

**A NYUKURI**

**JUDGE**

**In the presence of:**

Mr Liko for the plaintiff.

Mr Murunga for the defendant and holding brief for the interested party.

Ms Josephine Misigo – Court Assistant.

