



Ochieng (Suing on his Own Behalf and on Behalf of:) & 112 others v Kabarak Farm Ltd & 19 others; County Government of Trans Nzoia & 7 others (Interested Parties) (Environment & Land Petition 3 of 2017) [2022] KEELC 2982 (KLR) (21 June 2022) (Ruling)

Neutral citation: [2022] KEELC 2982 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT & LAND PETITION 3 OF 2017
FO NYAGAKA, J
JUNE 21, 2022
IN THE MATTER OF THE CONSTITUTION OF KENYA, 2010
AND
IN THE MATTER OF INFRINGEMENT AND OR VIOLATION OF THE PETITIONERS
CONSTITUTIONAL RIGHTS CONTRARY TO ARTICLES 19(2), 20(5), 21(1),
2, 2, 22(1), 23(1,2-A,D&E, 26, 27, 27(6), 28, 29, 35, 40, 40(1),(3)(A-B), (4), (6),
431(C & D),(3), 47,47(1-2), 60(1A), 62(4), 65(4), 66(1), 67, 68(C-IV, V, VII), 73(1),
(A),III &IV, 95 AND 165 OF THE NEW CONSTITUTION OF KENYA, 2010
AND
IN THE MATTER OF SECTION 3, 9 & 12 THE
GOVERNMENT LAND ACT, CAP 280, LAWS OF KENYA
AND
IN THE MATTER OF SECTION 65, 66, 67,68,69,70,167,177 &
PART X11 OF AGRICULTURAL ACT, CAP 318 LAWS OF KENYA

BETWEEN

CHARLES OPONDO OCHIENG (SUING ON HIS OWN BEHALF AND ON
BEHALF OF:) 1ST PETITIONER
NICK MUSUNGU (SUING ON HIS OWN BEHALF AND ON BEHALF
OF:) 2ND PETITIONER
BONIFACE MAKOKHA TELEWA (SUING ON HIS OWN BEHALF AND ON
BEHALF OF:) 3RD PETITIONER
JACOB PEPELA 4TH PETITIONER
JOHN WEKESA TELEWA 5TH PETITIONER
STANLEY SHAKILO 6TH PETITIONER



JAMIN WEKESA	7 TH PETITIONER
GODFREY WANJALA	8 TH PETITIONER
SIMON ENGOLAN	9 TH PETITIONER
JOSEPH OCHIENG	10 TH PETITIONER
ALEX MALAKWEN	11 TH PETITIONER
WYCLIFF WAFULA	12 TH PETITIONER
STEPHEN MABOKO	13 TH PETITIONER
FRED MUTORO	14 TH PETITIONER
WILSON KIMONGO	15 TH PETITIONER
SIMON MATETE	16 TH PETITIONER
WALTER LUI	17 TH PETITIONER
FRANCIS WEKESA	18 TH PETITIONER
PATRICK WANGIRA	19 TH PETITIONER
DISMASS WAFULA	20 TH PETITIONER
MARGARET NASAMBU	21 ST PETITIONER
RONALD BARASA	22 ND PETITIONER
NICKSON WEKESA	23 RD PETITIONER
AGNES KARORI	24 TH PETITIONER
LAZARO WEKESA MARAN	25 TH PETITIONER
JONES NASAMBU	26 TH PETITIONER
JOEL MUNG'ARE	27 TH PETITIONER
GRACE N. LUTURIAN	28 TH PETITIONER
LABAN WEFILA	29 TH PETITIONER
LINET KWAMBOKA	30 TH PETITIONER
STANLEY SIATAKO	31 ST PETITIONER
RUTH CHEPCHUMBA	32 ND PETITIONER
WILLIAM N. MARUTI	33 RD PETITIONER
PETER WANYONYI	34 TH PETITIONER
GRACE CHEMAYEK KUTWA	35 TH PETITIONER
RHODAH N. MNUPI	36 TH PETITIONER
MATAYO MWALATI	37 TH PETITIONER
JACOB S. MSIEBEBE	38 TH PETITIONER



JANE N. SUDI	39 TH PETITIONER
FLORENCE KERUBO OMOYO	40 TH PETITIONER
JUMA NYONGESA	41 ST PETITIONER
RICHARD WEKESA WANDERA	42 ND PETITIONER
EUNICE BARASA	43 RD PETITIONER
BENSON NAMUNYU	44 TH PETITIONER
RONALD NALULWE	45 TH PETITIONER
FRED W. MAKHAPILA	46 TH PETITIONER
JOHN SIMIYU	47 TH PETITIONER
ISAAC MKENDA	48 TH PETITIONER
BENSON M. WASILWA	49 TH PETITIONER
CYLUS L. LUCHACHA	50 TH PETITIONER
KENNEDY W. JUMA	51 ST PETITIONER
NANCY MUNYASIA	52 ND PETITIONER
JAMES WANJALA	53 RD PETITIONER
RICHARD KIMENGICH	54 TH PETITIONER
KATHLEEN K. M	55 TH PETITIONER
PETER KITUYI MFUTI	56 TH PETITIONER
W. WANJALA	57 TH PETITIONER
EVERLYNE LUTURIAN	58 TH PETITIONER
EDWIN NAMSHULE	59 TH PETITIONER
JANIFER SIMATWA	60 TH PETITIONER
RAFAEL SIMATWA	61 ST PETITIONER
PATRICK MADEGWA MATASO	62 ND PETITIONER
METRINE LUSIKE	63 RD PETITIONER
MARY N. NYONGESA	64 TH PETITIONER
AGNES MLONGO	65 TH PETITIONER
WYCLIFFE MPALIO	66 TH PETITIONER
ISAAC WASAI	67 TH PETITIONER
TITUS KITUYI	68 TH PETITIONER
TERESA KERUBO	69 TH PETITIONER
WEKESA B. MASINDE	70 TH PETITIONER



JOYCE KEMUMA	71 ST PETITIONER
TOM JOSEPH OMOYO	72 ND PETITIONER
WILKISTER MORAA	73 RD PETITIONER
LOICE NYAMBURA	74 TH PETITIONER
WILFRED SHIRENGO	75 TH PETITIONER
JAMES NGUNGI	76 TH PETITIONER
MARY NAFUNA	77 TH PETITIONER
MELABI WAMBIA	78 TH PETITIONER
DORIS BWARI	79 TH PETITIONER
ESTHER KINUTHIA	80 TH PETITIONER
EMELDAH K. OKOTOYI	81 ST PETITIONER
EMILLY NEKESA	82 ND PETITIONER
JOSPHAT WAFULA	83 RD PETITIONER
JOSEPH MASIKA	84 TH PETITIONER
ANDREW MAJIMBO	85 TH PETITIONER
ROBERT WANJALA	86 TH PETITIONER
CALEB WANJALA	87 TH PETITIONER
ROSELINE ONZERE	88 TH PETITIONER
GRACE KANANU	89 TH PETITIONER
MOURICE NYONGESA	90 TH PETITIONER
JOSEPH MHEMBERI	91 ST PETITIONER
DAVID NYUKURI	92 ND PETITIONER
MARK RAJA OKWARA	93 RD PETITIONER
JOHN OJIMU	94 TH PETITIONER
HUMPHREY W. BARASA	95 TH PETITIONER
CLEOPHAS B. MAYENDE	96 TH PETITIONER
CHILSON MLUPI	97 TH PETITIONER
NELSON SITOKI	98 TH PETITIONER
ALICE N. WEKESA	99 TH PETITIONER
FRANCIS SIATI	100 TH PETITIONER
REUBEN KACHUI	101 ST PETITIONER
KENNEDY WAFULA	102 ND PETITIONER



TOM SIMIYU	103 RD PETITIONER
WAMALWA SANYANDA	104 TH PETITIONER
JOHN MAKOKHA TALEWA	105 TH PETITIONER
ERNEST POPOI	106 TH PETITIONER
ROSELYNE KHAKASA	107 TH PETITIONER
YOHANA WAFULA	108 TH PETITIONER
JOSEPHAT MBITO	109 TH PETITIONER
HELLEN WAFULA	110 TH PETITIONER
PHILISTER N. NYONGESA	111 TH PETITIONER
BEN MLANGO	112 TH PETITIONER
IRINE OMUNAKI VIHIMA	113 TH PETITIONER

AND

KABARAK FARM LTD	1 ST RESPONDENT
ABMA INVESTMENT LTD	2 ND RESPONDENT
KIPSINENDE FARM LTD	3 RD RESPONDENT
LINSHIRE LTD	4 TH RESPONDENT
SIMON MBUGUA THUNGU	5 TH RESPONDENT
KENNETH HAMISH WOOLER KEITH, DESTERIO ANDADI OYATSI & ELIZABETH KLEM (BEING SUED AS EXECUTORS OF THE ESTATE OF HON. NICHOLAS BIWOTT)	6 TH RESPONDENT
SETTLEMENT FUND TRUSTEE	7 TH RESPONDENT
COMMISSIONER FOR LANDS	8 TH RESPONDENT
LAND REGISTRAR, TRANS-NZOIA COUNTY	9 TH RESPONDENT
DIRECTOR, LAND ADJUDICATION & SETTLEMENT TRANS-NZOIA COUNTY	10 TH RESPONDENT
COUNTY LANDS SURVEYOR, TRANS NZOIA COUNTY	11 TH RESPONDENT
CABINET SECRETARY FOR LANDS, HOUSING & URBAN DEVELOPMENT	12 TH RESPONDENT
NATIONAL LAND COMMISSION	13 TH RESPONDENT
INSPECTOR GENERAL OF POLICE	14 TH RESPONDENT
DIRECTOR OF PUBLIC PROSECUTIONS	15 TH RESPONDENT
NATIONAL ASSEMBLY OF KENYA	16 TH RESPONDENT
ATTORNEY GENERAL	17 TH RESPONDENT



CABINET SECRETARY, MINISTRY OF INTERIOR & CO-ORDINATION 18TH RESPONDENT

DOMINIC K. SINGOEI, ALBERT K. TOO, WALTER K. KEMBOI (AS REPRESENTATIVES OF 205 MEMBERS OF KIMNON INVESTMENT CO) 19TH RESPONDENT

KAPSITWET RIVER ESTATE LTD 20TH RESPONDENT

AND

COUNTY GOVERNMENT OF TRANS NZOIA INTERESTED PARTY

AREA MP, KWANZA CONSTITUENCY INTERESTED PARTY

KENYA HUMAN RIGHTS COMMISSION INTERESTED PARTY

ELDORET EXPRESS LTD INTERESTED PARTY

JOHN LONYANGAPUO INTERESTED PARTY

HENRY KIPLAGAT KIPTIONY INTERESTED PARTY

JOHN PORIOT (ON OWN BEHALF AND AS THE REPRESENTATIVE OF 80 OTHERS NAMED IN THE APPLICATION DATED 26/8/2017) INTERESTED PARTY

MOSES CHELELGO, JOB SANG & DANIEL KIBUNDO (ON OWN BEHALF AND AS THE REPRESENTATIVE OF 296 OTHERS NAMED IN THE APPLICATION DATED 24/6/2019) INTERESTED PARTY

RULING

(On whether to grant an order for status quo pending Appeal)

1. This is a Ruling on an Application filed by the Petitioners on 22/11/2021, also bearing the same date of filing. It was brought under Order 50 Rule 1 of the *Civil Procedure Rules*, 2010 and Sections 1 and 3A of the *Civil Procedure Act*, Chapter 21 of the Laws of Kenya and all enabling provisions of law. The application seeks the following orders:
 - 1) ...spent
 - 2) There upon hearing and determination this application this Honourable Court be and is hereby pleased to issue status quo orders as at 22nd November, 2020 be issued against the Respondents and Interested Parties in respect of land parcel No. LR 2046 comprised in Certificate No. IR. 318/1 situated within Trans Nzoia County that gave rise to parcels No. Kwanza/Namanjalala/Block4/1, Kwanza/Namanjalala/ Block 4/2, Kwanza/Namanjalala/ Block 4/3 Kwanza/Namanjalala/ Block 4/4 until the appeal is heard and determined.
 - 3) That costs of this application be in the cause.
2. The Application was based on based five (5) grounds and supported by an affidavit sworn jointly by Charles Opondo Ochieng, Nick Musungu and Bonface Makoka Telewa. The grounds were basically that judgment was delivered herein on 3/05/2021 herein the Petitioners partially succeeded as against the 6th and 20th Respondents; the Petitioners were desirous of appealing against the Respondents in



respect of the prayers not granted in the Petition; they had filed a Notice of Appeal and requested for proceedings to enable them file the appeal in a timely manner; the Respondents who were in occupation of the parcel of land in issue were currently engaged in the subdivision of the subject parcels of land which actions would render the Appeal nugatory in let to continue hence it was in the interest of justice that the orders sought be granted. The Applicants reiterated the contents of the grounds in the Supporting Affidavit save that they annexed to it a copy of the Draft Memorandum of Appeal to evidence the fact that the intended appeal had high chances of success.

3. The 19th Respondent filed a Replying Affidavit in opposition to the Application. It was sworn by one Dominic Kipsugut Songoei on 07/02/2022. The deponent stated that he was the Chairman of Kimnon Investment Company, the 19th Respondent herein. He restated the fact that the Petitioners'/ Applicants' claims against the 1st-6th, 7th-13th, and 16th-19th Respondents were dismissed with no order as to costs. He then stated that the order of dismissal was incapable of being stayed hence the application was incompetent and a candidate for striking out.

Submissions

4. The Applicants filed written submissions dated 26/11/2021 on the same date. In them they posed a number of issues for the Court to determine. One, was whether they were entitled to orders of status quo in respect of the disputed land. They answered in the affirmative and relied on the case of Meru ELC Appeal No. 31 of 2020, Fatuma Abdi Jollo vs. Kuro Lengeson & Another, where the judge explained that when a Court orders that status quo be maintained it expects that the circumstances as at the time of the order must be maintained so as to preserve the state of affairs. They also relied on Murithi Jon Baobab Beach Resort as cited in *In the matter of an application by Saifudeen Abdullabhai & 4 others for leave to apply for judicial review and for orders of certiorari and prohibition* [2013]eKLR. They then explained the reasons why, in their understanding, the intended appeal had high chances of success by highlighting on each of the proposed grounds of appeal.
5. The 19th Respondent submitted on 24/02/2022 vide a set of submissions dated 22/02/2022. In them it stated that the Applicant's submissions were misconceived and bad in law since the order of status quo cannot obtain. It reiterated that the judgment only dismissed the Petitioners' claim against the parties stated in the Affidavit. They then submitted that Order 42 Rule 6 of the Civil Procedure Rules only applies to situations where a matter is pending in Court for further proceedings and not where none is existing. It then submitted that the Applicants were seeking orders of injunction in respect of the parcels of land named in their application and Order 42 Rule 6 did not donate power to the Court to issue such orders pending the hearing of an appeal. It then stated that only the Court of Appeal could, in an appropriate case, issue injunctive orders under Rule 5(2)(b) of the Court of Appeal Rules.
6. They then summed it that the Court did not, in its judgment, make orders touching on the land parcels Kwanza/Namanjalala Bock 4/1, 2, 3 and 4. They stated that the Court simply dismissed the petitioners' cases against the named Respondents and all interested parties. They then relied on the cases of *West College of Arts and Applied Sciences v Orange and others* (1976) KLR, 63 and *Peter Anyang Nyongo & 2 Others v Safaricom Limited* 92007) eKLR (sic).

Analysis And Determination

7. I have carefully read through the Application and the Affidavit in support thereof, the Replying Affidavit and the submissions thereto. I have also considered the law applicable and the case law relied on by the Petitioners and other relevant case law generally. I find that the issues for determination are:



- a. Whether the Applicant satisfied the requirements for grant of an order for status quo pending appeal.
 - b. Whether to bear the costs of the Application.
8. I start with an analysis of the first issue before me, which is whether the Court should issue an order of status quo. I have anxiously considered the Application before me. If I understood the Petitioners correctly, they intend that the Court issues orders of maintenance of status quo as at 22/11/2021 in respect of the parcels of land they stated in the prayers of the Application, the grounds thereof and the supporting Affidavit because they intend to pursue and appeal in the Court of Appeal against the judgment of the Court delivered on 3/05/2021. They annexed to the supporting Affidavit both the copy of the Notice of Appeal and the Memorandum of Appeal in that regard.
9. My understanding of the law is that there is a difference between the grant of an order of status quo and one for stay of execution of a decree pending the hearing and determination of an appeal (preferred). According to Bryan A. Garner (2019), Black's Law Dictionary, 11th Edition, Thompson Reuters, St. Paul, MN, 1703, status quo means "state in which", that is to say, "The situation that currently exists." In the same Dictionary, the phrase stay of execution means the "the postponement or halting of a proceeding, judgment or the like". They cannot be one and the same because the former relates to the state of things as obtains irrespective of others or occurrences of other things. But the latter is in respect of actions taking place, and in this regard, proceedings in a certain action. For relevance purposes, the Applicants moved this Court for issuance of the orders sought due to the fact that they had preferred an Appeal from part of the judgment of this Court. Thus, the relevant provisions thereto are in Order 42 of the Civil Procedure Rules, 2010.
10. I have had to distinguish the two phrases because when a party prefers an appeal from a judgment or order of a Court and wishes the execution thereof halted, he/she should file an Application for stay of execution of the order or decree. And in terms of Order 4 Rule 6(4), once a Notice of Appeal is lodged against a decision of a superior Court, it is deemed that an Appeal has been filed in the Court of Appeal. In such circumstances the Applicant then has to satisfy the conditions for grant of stay of execution of the order or decree pending appeal. But the order of status quo should not and cannot be used as a substitute for an order of stay of execution. I would state that the orders of status quo serve a special purpose in the civil law practice and procedure in comparison with those of stay of execution of a decree or order. To equate the two or treat them as one and the same thing would put the practice into confusion and call into application totally different principles for the grant of such diverse orders. Suffice it to say that orders of status quo serve to maintain the state of things as they are. In my view they should not be sought in situations where one would move the Court for a stay of execution.
11. In *Republic vs National Environment Tribunal, Ex-parte Palm Homes Limited & Another* [2013] eKLR, Odunga J. stated:

"When a court of law orders or a statute ordains that the status quo be maintained, it is expected that the circumstances as at the time when the order is made or the statute takes effect must be maintained. An order maintaining status quo is meant to preserve existing state of affairs...Status quo must therefore be interpreted with respect to existing factual scenario..."



12. Also, in *TSS Spinning & Weaving; Company Ltd vs Nic Bank Limited & another* [2020] eKLR the court was of the view that:

“In essence therefore, a status quo order is meant to preserve the subject matter as it is/existed, as at the day of making the order. Status quo is about a court of law maintaining the situation or the subject matter of the dispute or the state of affairs as they existed before the mischief crept in, pending the determination of the issue in contention”.

13. Similarly, 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.”

14. In essence Order 42 Rule 6(2) of the Civil Procedure Rules sets out the requirements to be taken account when a party seeks to stay execution of a decree or order of a Court. This, the Applicants neither met nor attempted to show except for stating that the intended appeal raises triable issues and that it would be rendered nugatory. It was not shown what triable issues these were. In any event, the orders of the Court as against the Respondents were negative ones in the sense that they entailed dismissal of the Petitioners’ claims against the Respondents hence incapable of being stayed. Again, the Applicants only merely stated on oath that the Respondents and Interested Parties were, in the recent past, engaged in subdividing the parcels of land and selling them. In my view, this blanket statement that is unsupported by way of specificity and or documentary proof is of no avail to an applicant who wishes the Court to exercise its discretion in his favour. The upshot is that the Application dated 22/11/2021 is not merited hence incapable of being granted.

15. What is left of me to decide is the second issue, which is: who to bear the costs of the instant application. As stated above, the Application dated 22/11/2021 is lost. Since costs follow the event, they shall do so in the instant circumstances. Thus, the Applicants shall bear the costs of the Application.

Orders accordingly.

RULING, DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL THIS 21ST DAY OF JUNE, 2022.

DR. IUR FRED NYAGAKA

JUDGE, ELC, KITALE.

