



REPUBLIC OF KENYA



KENYA LAW
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**Mburu v Kibara & 2 others (Environment & Land Case
237 of 2021) [2022] KEELC 3226 (KLR) (28 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 3226 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 237 OF 2021**

**LL NAIKUNI, J
JULY 28, 2022**

BETWEEN

DANSON KAMAU MBURU PLAINTIFF

AND

SAMUEL MARINGA KIBARA 1ST DEFENDANT

JOSEPH KIBARA 2ND DEFENDANT

ALPHONCE FRANCO MWELE 3RD DEFENDANT

RULING

I. Introduction

1. For its determination before this honorable court is the notice of motion application dated November 23, 2021 and filed on November 25, 2021 by the plaintiff/applicant. The application is brought pursuant to the provisions of sections 1A, 1B and 3A of the *Civil Procedure Act*, cap. 21 and order 40 rules 1 & 3 and order 51 of the *Civil Procedure Rules*, 2010. The Plaintiff seeks for the following orders:-
 - a) Spend;
 - b) That this Honorable Court be minded to issue an order of prohibition, prohibiting Charge, mortgage, transfer or any dealings with the property known as LR. No. Mombasa/mwembelegeza/726 pending further orders of this Court.
 - c) That this Honorable Court be minded to issue mandatory injunction directed to the Defendants by themselves, agents and/or servants to immediately vacate the suit premises known as LR. No. Mombasa/mwembelegeza/726 pending further orders of this Court.
 - d) That this Honorable Court be minded to direct that the OCS Bamburi Police Station to oversee the implementation of the orders herein.



- e) That the Costs of this application be provided for.
2. It will be noted that alongside the Plaint, the Plaintiff filed this instant application. However, none of the 1st, 2nd and 3rd Defendants herein have filed their defence to date. As an indication that proper service was effected by the Plaintiff, the 1st and 2nd Defendants entered their appearance.

II. The Plaintiff/Applicant's case

3. The application is premised on the grounds, testimonial facts and the averments of 22 Paragraphed Supporting Affidavit of Danson Kamau Mburu sworn and dated 23rd November, 2021 together with seven (7) annexures marked as "DKM - 1 to 7" annexed thereof. He deposed that he was an adult male of sound mind, well conversant with the facts of this matter and hence competent to swear this affidavit. He averred that sometimes in the year 2010 one Mr Mbarak Salim Said, the Vendor herein, and him entered into a sale agreement for the sale of all that parcel of land known as Land Reference Numbers Mombasa/mwembelegeza/726 (Hereinafter referred to as "The Suit land") terms and conditions stipulated thereof. The plaintiff annexed the sale agreement for the sale and purchase of the suit property and a Title deed.
4. He stated that upon complying with all the terms of the agreement the Vendor executed the transfer forms for the suit land while he made all the payments thereof. He posited that he was the registered owner of the suit property and he took possession of the same. He informed court that at the time of purchasing it, there only consisted of incomplete commercial buildings and which the same remained in that state as he searched for funds to complete the same. He retained a Caretaker on the property who maintained it. He
5. However, he asserted that in the year 2019, the Defendants herein entered the premises and commenced unauthorized activities on the property. This led him lodging a complain at the Bamburi police and Kenya Power & Lighting Company due to the illegal connection of electricity at the subject matter and who did disconnect the electricity. But the trespass escalated the year of 2021 and the Defendants through their agents made further demolitions of the constructions on the suit land causing extensive damages. He informed Court that the 1st Defendant was summoned by the police. He alleged that he was an agent of the 2nd Defendant who had a lease with the 3rd Defendant. He refuted having ever leased or transferred the suit property to any party, Hence, the Defendants were trespassers. Thus, the Defendants were warned by the Officer In Charge of the police Station (OCS) for them to desist from any further acts of trespass on the suit land.
6. Despite all these warnings, the Plaintiff claimed, the Defendants had entered the suit property and set up a club. He had again reported the matter to the police. The Plaintiff urged the Honorable Court to grant the orders sought because he continued to suffer damages as he could not utilize the suit property.

III. The 1st & 2nd Defendants Case

7. On February 7, 2022, the Counsels for the 1st and 2nd Defendants herein, the Law firm of Messrs. Birir & Co. Advocates opposing the application, filed a two (2) points Grounds of Opposition, dated February 4, 2022. They averred that:-
- a) The application lacked ground to stand on. It was an abuse of the Court process as the parties mentioned as the 1st & 2nd Defendants had no connection whatsoever with the suit property.
- b) That the application was misconceived, fatally defective, bad in law and should be struck out.



IV. Submissions

8. On February 8, 2022, in the presence of all the parties herein, the Honorable Court directed parties to canvass the matter by way of written submissions. Unfortunately, at the time of writing this ruling, the parties had not filed their written submissions. Nonetheless, upon the lapse of the stipulated timeline, Court has decided to render its ruling accordingly.

V. Analysis & Determination

9. This Court has considered all the issues raised in the Notice of Motion application dated 23rd November, 2021, the Supporting affidavit and the grounds of opposition by the 1st and 2nd Defendants herein dated 4th February, 2022. In a order to arrive at an informed, just, fair and reasonable decision, the Court has framed the following issues for its determination. These are:-
- a) Whether the Notice of Motion application dated 23rd November, 2021 meets the established threshold for granting temporary or mandatory injunction orders.
 - b) Whether the order of Mandatory injunction sought can be granted at the interlocutory stage.
 - c) Whether the parties are entitled to the relief Sought.
 - d) Who will bear the Cost of the application

ISSUE No. a). Whether the Notice of Motion application dated 23rd November, 2021 meets the established threshold for granting temporary or mandatory injunction orders.

The Brief facts

10. Before embarking on these issues of analysis, the Honorable Court feels it imperative to provide brief facts of the case. From the filed pleadings, this suit was instituted by way of a Plaint filed on 25th November 2021. The Plaintiff holds being the registered owner of the suit having purchased it in the year 2012. He stated that at the time of purchase, the suit property comprised of incomplete housing units, and he was in the process of sourcing funds to complete the same. He pleaded that the Defendants entered the suit property and demolished part of the walls and he had consequently, reported them to Bamburi Police Station. The Plaintiff further claimed that this continued trespass by the Defendants had caused him losses in revenue as he could not complete the developments for rental purposes. It was for these reasons that the Plaintiff prayed for judgment against the Defendants for inter alia orders of mandatory injunction, prohibition from entering the suit property, and an order of eviction of the Defendants from the suit property. It will be noted that despite service having been effected, its only the 1st and 2nd Defendants who entered appearance and filed some grounds of opposition. The 3rd Defendant has not filed anything. These issues will be dealt with at some stage later on.
11. As indicated, the application was brought under order 40 rules 1 and 3 of the [Civil Procedure Rules, 2010](#). The Law stipulates as follows:-

“ [Order 40. rule 1] Cases in which temporary injunction may be granted.

Where in any suit it is proved by affidavit or otherwise—

- (a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or



- (b) that the Defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the Plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the Defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.”

“[Order 40, rule 3.] Consequence of breach.

- (1) In cases of disobedience, or of breach of any such terms, the court granting an injunction may order the property of the person guilty of such disobedience or breach to be attached, and may also order such person to be detained in prison for a term not exceeding six months unless in the meantime the court directs his release.
 - (2) No attachment under this rule shall remain in force for more than one year, at the end of which time, if the disobedience or breach continues, the property attached may be sold, and out of the proceeds the court may award such compensation as it thinks fit, and shall pay the balance, if any, to the party entitled thereto.
 - (3) An application under this rule shall be made by notice of motion in the same suit.
12. In addition, this application was also brought under the provisions of Sections 1A, 1B and 3A of the *Civil Procedure Act*, which grants this court a wide discretion to grant interlocutory orders as may appear to be just and convenient.
13. From a quick glimpse of the pleadings, the orders sought in this application are an order of prohibition, prohibiting the charge, mortgage, transfer or any dealing with the suit property and a mandatory injunction directed to the Defendants to vacate the suit property. From the facts presented, it is clear that the Plaintiff has “Prime Facie” evidence on being the registered and absolute owner of the suit property and hence entitled to the temporary orders sought.

ISSUE No. b). Whether the order of Mandatory injunction sought can be granted at the interlocutory stage.

14. Under this sub – heading, for clarity sake, it is important to critically assess the two forms of injunctions herein. A mandatory injunction is different from a prohibitory injunction. While a prohibitory injunction the Applicant must, as was stated in the celebrated case of “*Giella v Cassman Brown & Co. Ltd* [1973] EA 358, establish the existence of a prima facie case with high chances of success, and that he would suffer irreparable loss/damage which could not be adequately compensated by an award of damages if the injunction was not granted, and further that the balance of convenience tilted in his favour. For the orders of mandatory Injunction, an Applicant must in addition, establish the existence of special circumstances. Furthermore, the applicant must prove the case on a standard higher than the standard in prohibitory injunctions.
15. Generally, an Applicant is entitled to be granted the Permanent and/or Mandatory Injunction restraining the Defendant herein on his suit property. Unlike Temporary Injunction which are granted only to be in force for a specified time or until the issuance of further orders from Court, Permanent Injunction are rather different, in that they are perpetual and issued after a Suit has been heard and finally determined.



16. Legally, permanent Injunction fully determines the right of the Parties before the Court and is normally meant to perpetually restrain the commission of an act by the Defendant in order for the rights of the Plaintiff to be protected. This Court has the powers to grant the Permanent Injunction under sections 1A, 3 & 3 A of the *Civil Procedure Code* if it feels the right of a Party has been fringed, violated and/or threatened as the Court cannot just seat, wait and watch under these given circumstances.
17. It's the effect of the order that matter as opposed to it mere positive working which makes it mandatory. The circumstances under which the Court would grant a Mandatory Injunction was well stated out by the Court of Appeal in the Case of "*Malier Unissa Karim v Edward Oluoch Odumbe* [2015] eKLR as follows:-

“The test for granting a Mandatory Injunction is different from that enunciated in the “Giella v Cassman Brown case which is the locus classicus case of Prohibitory Injunctions. The threshold in Mandatory is higher than the case of Prohibitory Injunction and the Court of Appeal in the case of “Kenya Breweries Limited v Washington Okeyo [2002] EA 109” had the occasion to discuss and consider the principles that govern the grant of a Mandatory Injunction was correctly stated in Vol. 24 Halsbury Laws of England 4th Edition Paragraph 948 which states as follows:-

“A Mandatory Injunction can be granted on an interlocutory application as well as at the hearing but in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the Court thinks ought to be decided at once or if the act done is simple and summary one which can be easily remedied, or if the Defendant attempts to steal a march on the Plaintiff, a Mandatory Injunction will be granted on an Interlocutory application”.

18. Further the same Court of appeal in the case of “Jay Super Power Cash and Carry Limited v Nairobi City Council and 20 others CA 111/2002” held that:-

“This Court has recognized and held in the past that it is the trespasser who should give way pending the determination of the dispute and it is no answer that the alleged acts of trespass are compensable in damages. A wrong doer cannot keep what he has taken balance he can pay for it”.

In the case of ‘Kenya Breweries Ltd & Another v Washington O. Okeya [2002] eKLR, the Court of Appeal stated as follows on mandatory injunctions.

“A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances, and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the Defendant had attempted to steal a march on the Plaintiff. Moreover, before granting a mandatory interlocutory injunction, the court had to feel a higher degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction.”



19. Additionally, in the case of *Nation Media Group & 2 Others v John Harun Mwangi* [2014] eKLR, the Court of Appeal said:-

“It is trite law that for an interlocutory mandatory injunction to issue, an applicant must demonstrate existence of special circumstances... A different standard higher than that in prohibitory injunction is required before an interlocutory mandatory injunction is granted. Besides existence of exceptional and special circumstances must be demonstrated as we have stated a temporary injunction can only be granted in exceptional and in the clearest of cases.”

20. The above-cited cases lay down the principles of law to be considered in both an application for a prohibitory injunction and mandatory injunction, the difference that stands out between these two orders is that for mandatory injunction, the applicant must establish the existence of special and exceptional circumstances that warrant the granting of orders of mandatory injunction.
21. In this instant application, the Plaintiff through his affidavit in support of the application together with the annexures demonstrated that he purchased the suit property and subsequently was registered as the proprietor of the suit property. The plaintiff alleges that there are developments on the suit property. He annexed photographs of the ‘club’. However, it is unknown whether those developments are indeed on the suit property. In addition to this, the Plaintiff has claimed that the Defendants have been trespassing into his land to undertake illegal activities such as the illicit connection of electricity. He averred that he reported this to Kenya Power who consequently disconnected the electricity. The Plaintiff has annexed a letter from Kenya Power confirming the same, however, it is not clear whether the connection and subsequent disconnection were on the suit property or another property. The Plaintiff has also claimed that the defendants demolished the already developments that were on the suit property and this was reported to the police. These allegations have neither been proven nor was a copy of the police Observation Book annexed.
22. On their part, the 1st and 2nd Defendants herein only filed grounds of opposition claiming to be strangers to the allegations. They stated that they have no connection to the suit property. The Plaintiff annexed a letter from the KPLC with the reference being ‘Illegal Connection of Electricity at Mwembe Legeza, Bamburi’. The letter was addressed to the Plaintiff. In that letter, the KPLC stated that they provided service cable and further connected electricity to a property as per an application by the 1st Defendant. The KPLC further informed the Plaintiff that they had disconnected the said electricity supply as per his letter addressed to Kenya Power Customer Service Engineer.
23. Paradoxically, this Court has noted that although the 1st and 2nd Defendants contended that they had no connection to the suit property but they still applied for electricity connection from the KPLC. It is also unclear whether the ‘club’ as seen from the photographs is situated on the suit property. There is no evidence of the alleged demolished buildings/houses that were allegedly already on the suit property. In the absence of a survey report or even a scene visit, it is impossible to ascertain whether the alleged encroachment and trespass is on the suit property. In the given circumstances, therefore, neither the conditions for the grant of prohibitory injunction nor the grant of mandatory injunction have been met.

ISSUE c). Whether the parties are entitled to the relief sought.

24. Despite this, it must be appreciated that at this interlocutory stage, the Plaintiff has annexed evidence that he is the registered proprietor of the suit property and that in some way, his right as a proprietor is being infringed. It is implicit that the status of the suit property be preserved, and that there be no



further development, construction, or even alienation or charge of the suit property till this suit is heard and determined.

25. The *Black's Law Dictionary*, Butter Worth's 9th Edition, defines status quo as a Latin word which means 'the situation as it exists'. The purpose of an order of status quo has been reiterated in a number of decisions. In the case of "*Republic v National Environment Tribunal, Ex-parte Palm Homes Limited & Another* [2013] e KLR, 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 the existing state of affairs...Status quo must therefore be interpreted with respect to existing factual scenario..."

26. In the case of "*Kenya Airline Pilots Association (KALPA) v Co-operative Bank of Kenya Limited & another* [2020] e KLR, 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."

ISSUE No. b). Whether the parties are entitled to relief sought

27. Under this Sub heading, apart from preserving the substratum of the subject matter, It is my view that an order of status quo is a case management strategy, where the court will be keen to prevent prejudice as between the parties to a matter pending the hearing and determination of the main suit. In this instant application, there is a development, (club) that the Plaintiff claim belong to the Defendants and is situated on the suit property. The Plaintiff prays that the 1st, 2nd and 3rd Defendants vacate the suit property. The Plaintiff has also shown that he is the registered proprietor of the suit property. However, as earlier stated it is impossible without a survey report or a scene visit to tell whether the said club is located on the suit property. Both parties as it stands have an interest that needs to be preserved pending the determination of this suit. To meet the end of justice, neither party should be prejudiced.
28. Having discussed the definition and purpose of a status quo order, the next question is the nature of the order and whether it differs from an injunctive order. In the case of "*Fatuma Abdi Jillo v Kuro Lengesen & another* [2021] eKLR", It was stated as follows:-

"Murithi Jin Boabab Beach Resort as quoted by F. Tuiyot Saifudeen Abdullahi & 4 Others in Mombasa High Court Misc. Civil Cause No. 11 of 2012, described the nature of a status quo order as follows:

"In my view, an order to Status quo to be maintained is different from an order of injunction both in terms of the principles for grant and the practical effect of each. While the latter is a substantive equitable remedy granted upon establishment of a right, or at interlocutory stage, a prima facie case, among other principles to be considered, the former is simply an ancillary order for the preservation of the situation as it exists in relation to pending proceedings before the hearing and determination thereof. It does not depend on proof of right or prima facie case. In its effect, an injunction may compel the doing or restrain the doing of a certain act, such as, respectively, the reinstatement of an evicted tenant or the



eviction of the tenant in possession. An order for status quo merely leaves the situation or things as they stand pending the hearing of the reference or complaint.”

29. Further, in the case of “*Thugi River Estate Limited & another v National Bank of Kenya Limited & 3 others* [2015] eKLR, Onguto J. stated that an order of status quo can be given by the court exercising its general jurisdiction and that the order need not necessarily be prayed by the parties and in fact, can be originated by the court.

“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... 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.”

30. Odunga J. in the case of “*Thugi River Estate Limited* (supra) goes further to set out the proper manner in which the court ought to frame a status quo order, especially where it is one that the court has originated. He stated that;

“.... 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.”

31. In summary from the above cases, the following matters relating to status quo orders are emergent; that status quo orders can be made by the court on its own motion in the exercise of its general jurisdiction; that status quo orders can be issued for the purpose of preserving the subject matter of the property, for case management reasons and in a bid to prevent prejudice from being visited against either party to the case; that status quo orders are different from injunctions, meaning that the considerations to be established for grant of injunctions are not necessary under status quo orders; and that a court originating status quo orders to explicitly frame the state of affairs to be preserved.

ISSUE No. c). Who will bear the Costs of the application

32. It is trite law that the issue of Costs is at the discretion of Court. Costs mean any award that is granted to a party after the conclusion of any legal action, proceedings and/or process in a litigation. The proviso of the section 27 (1) holds that Costs follow the events. By events here, it means the results or outcome from the said legal action, proceedings and/or process.

In the instant case, having carefully considered the application filed on 23rd November, 2021, its decided that the costs to be in the cause.



IV. Conclusion & Disposition

33. In long run and after holding indepth analysis of the framed issues herein, this Honorable Court proceeds to make the following findings. These are:-

- a) That the Notice of Motion application dated 23rd November, 2021 partially succeeds only to the extent that there be status quo to be maintained on the suit land meaning there shall be no transaction whatsoever including but not limited to alienation, charging, mortgaging, leasing or transferring of proprietary interest of the suit property until this matter is heard and determined.
- b) That for expediency sake, this matter be fixed for hearing and final determination within the next one hundred and eighty (180) days from this date hereof. There shall be a Mention on 18th October, 2022 for purposes of conducting a Pre Trial Conference under Order 11 of the Civil procedure Rules and fixing of a hearing date thereof.
- c) That there shall be no eviction of any party from the suit property; and
- d) That there shall be no further constructions or development by the Defendant on the suit property and any constructions by the Defendants that is ongoing on the suit property to forthwith cease.
- e) That there shall be maintained peace and tranquility by all the parties and their agents at the suit land at all times during the pendency of this suit until it is heard and determined.
- f) That costs to be in the cause.

34. IT ORDERED ACCORDINGLY.

RULING DELIVERED, SIGNED AND DATED THIS 28TH DAY OF JULY 2022.

HON. JUSTICE MR. L.L NAIKUNI (JUDGE),

ENVIRONMENT & LAND COURT AT,

MOMBASA

In the presence of:-

- a) **M/s. Yumnah, the Court Assistant.**
- b) **M/s. Waweru Advocate holding brief for Mr. Gachumo Advocate for the Plaintiff/Applicant.**
- c) **No Appearance for the 1st, 2nd & 3rd Defendants/Respondents].**

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