



REPUBLIC OF KENYA



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The East African Portland Cement Company Limited v Kathilu & 49 others (Environment & Land Case 155 of 2016) [2022] KEELC 4857 (KLR) (19 September 2022) (Ruling)

Neutral citation: [2022] KEELC 4857 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ENVIRONMENT & LAND CASE 155 OF 2016

CA OCHIENG, J

SEPTEMBER 19, 2022

CONSOLIDATED WITH

**1. PET NO 40/2016: NAFTARY KARIUKI & OTHERS V EAPCC &
ANOTHER**

**2. JR NO 90/2016: PATRICK MAINGI NGUKU & OTHERS V
EAPCC**

**3. ELC NO 1190/2015: SYOKIMAU BRIGHT HOMES & OTHERS V
EAPCC**

**4. MISC. APPL. NO. 428/2015: FRANCIS KIRIMA M'IKUNYUA &
OTHERS VS EAPCC**

**5. ELC NO 1108 OF 2015: EAPCC V SAMMY KATHILU & 49
OTHERS**

**6. JR APPL. NO 04/2016: PATRICK MAINGI NGUKU & OTHERS V
EAPCC**

AND

1. KYALO NYUMBU KYAKA

2. LAWRENCE MUTUKU

**3. CHRISTOPHER MULEI (SUING AS REPRESENTATIVES' GROUP
COMMITTEE MEMBERS ON BEHALF OF MASUA SELF
HELP GROUP).....APPLICANTS/INTERESTED
PARTIES**



VERSUS

**1. KENYA URBAN ROADS AUTHORITY
2. HON ATTORNEY GENERALINTENDED
DEFENDANT/APPLICANT**

BETWEEN

**THE EAST AFRICAN PORTLAND CEMENT COMPANY
LIMITED APPLICANT**

AND

SAMMY KATHILU & 49 OTHERS RESPONDENT

RULING

1. What is before court for determination is the intended defendants/ applicants' Notice of Motion application dated August 2, 2021 where they seek the following orders:
 1. Spent
 2. That this honourable court be pleased to set aside its orders made on July 26, 2021 pending the hearing and determination of this application *inter partes*.
 3. That this honourable court be pleased to set aside its orders issued on July 26, 2021 pending the hearing and determination of the Notice of Motion dated July 16, 2021.
 4. That the costs of this application be provided for.
2. The application is premised on the grounds on the face of it and the Supporting Affidavit of Eng Paul Kamande, the assistant director, Kenya Urban Roads Authority where he deposes that the application dated the July 16, 2021 proceeded in their absence. He explains that they were served with the application dated July 16, 2021 on July 23, 2021. Further, that the said application was slated for *inter partes* hearing on July 26, 2021, on which date their counsel appeared in court to seek for more time to file a response and he was assured no orders would be made until they filed their Replying Affidavit. He insists the court proceeded to hear the Notice of Motion application dated the July 16, 2021 without according them an opportunity to be heard. Further, they were dissatisfied with the said orders and elected to apply for their setting aside, variation or discharge. He avers that the plaintiffs seek to enforce the said orders which will occasion them great prejudice. He contends that the existing road is only being upgraded to Bitumen Standards and there will be no evictions, dispossessions or demolition of buildings in undertaking the said works. Further, that the project dubbed 'Athi Smart City' is of national importance. He avers that the contract to upgrade to bitumen standards roads within East African Portland Housing Scheme was awarded on April 14, 2021, the form of agreement was signed on May 13, 2021 and the order to commence was issued by the engineer on May 24, 2021 with the completion date scheduled for December 26, 2023. Further, that the contractor has set a site camp within East Africa Portland land, off Mombasa road, mobilized the staff including equipment for the project works. He reiterates that preliminary proceedings have been commenced and unless the orders issued on July 26, 2021 are set aside, varied or discharged, it will cost the government not less



- than kshs 5 million per day to sustain the project and loss incurred will amount to kshs 150 million per month due to idle equipment as well as staff. He states that funds have been committed for the project and contractor hired. Further, the plaintiffs and defendants will not suffer any damage or prejudice.
3. The representatives of Masua Self Help Group being Kyalo Nyumbu Kyaka, Lawrence Mutuku and Christopher Mulei opposed the instant application by filing a Replying Affidavit where they depose that the application is misconceived, an afterthought and abuse of the court process. They contend that there has been a court process pending from 2016 to date and the suit herein revolves around ownership of land. They insist there are orders of *status quo* which were in place to preserve the subject matter, which the applicants should have applied to set aside first before undertaking activities on the suit land. Further, that the law protects individuals or communities in occupation of land and any dispossession must be done in accordance with the law. They aver that the applicants entered the land without notice, proper procedure and/or consultation with the residents. They state that the applicants ignored the situation analysis and proceeded to commence constructions with total disregard to the members. Further, they have not been informed of the alternative settlement area.
 4. The representatives of Masua Self Help Group being Kyalo Nyumbu Kyaka, Lawrence Mutuku and Christopher Mulei filed another affidavit on March 30, 2022 where they reiterated their averments above and stated that the orders of July 26, 2021 were issued as the applicants were not parties to the suit and there was need for a specific order. They claim the applicants have not informed the court in whose interests they are acting for. Further, the applicants have not demonstrated to this court how they acquired the land. They state that in Petition no 46 of 2019, Komingoi J, sitting at Nairobi, blocked the government plan to acquire 4,272 acres from the suit land for not following the law. They reiterate that the projects are mainly to benefit private investors at the expense of real squatters or owners. Further, in Petition no 20A of 2020 Justice Angote sitting in Machakos dismissed the EAPC case to claim ownership of the entire suit land. They aver that the Applicants have not come to court with clean hands and they will suffer immensely if the orders are set aside.
 5. In opposition to the instant application, the 1st and 2nd interested parties filed a Replying Affidavit sworn by Bernard Masingi Maluki the chairperson of Jisimamishe SHG Self Help Group where he deposes that the same lacks merit and is full of falsehood. He contends that the orders granted on July 26, 2021 are for maintaining the existing *status quo* on the suit lands pending the hearing and determination of the application dated the July 16, 2021 as it was necessary to maintain the substratum of the suit. He avers that the activities carried out by the applicants in the suit land have greatly interfered with the residents as they had disregarded the rights of the said residents to use the land. They insist the claim by the applicants that they are upgrading the existing roads is false as it is excising new roads through the suit land and they are apprehensive their houses will be demolished. Further, the roads are being excised without any form of consultation and the process of compulsory acquisition has not been adhered to. He claims the land where the camp was set up was forcefully taken away from the people residing thereon. They reaffirm that the activities being carried out in the suit land by the applicants under the behest of executing a government contract are illegal and should be stopped. Further, that the government has never conducted public participation on the implementation of the project dubbed 'Athi Smart City'. He states that on the July 19, 2018, the court had issued an order for *status quo* to be maintained on the suit land pending the hearing and determination of the suit. Further, the conduct and activities of the applicants on the suit land are directly undermining the said order of *status quo*.
 6. The application was canvassed by way of written submissions.



Analysis and determination

7. Upon consideration of the Notice of Motion application dated August 2, 2022 including the respective affidavits and rivalling submissions, the only issue for determination is whether the orders issued on July 26, 2021 should be set aside, discharged or varied.
8. The applicants in their submissions reiterated their averments and contend that they stand to be prejudiced with the impugned orders. They claim the orders are contrary to the principles of natural justice as they were not given an opportunity to be heard. To buttress their averments, they relied on the following decisions: *SM V HE* (2019) eKLR; *Philip Ongom, Capt vs Catherine Nyero Owota Civil Appeal no 14 of 2001* (2003) UGSC 16 and *Gotv Kenya Limited v Royal Media Services Limited & 2 Others* (2015) eKLR.
9. The 1st and 2nd interested parties in their submissions reiterated their averments in the Replying Affidavit and insist the conduct of the state in the circumstances will cause arbitrary deprivation of the right to own property for the people residing on the suit land. To support their averments, they relied on the following decisions: *Giella Vs Cassman Brown & Co Ltd* (1973) EA 360; *Mrao vs First American Bank of Kenya Ltd & 2 others* (2003) KLR 1259 and *American Cynamid Co Vs Ethicon Ltd* (1975) 1 All ER.
10. The 49th defendant and Kyeni Kya Canaan SHG (Interested Party) in their submissions insist the application is tainted with falsehood as there were already existing orders of *status quo* to be maintained until matter is heard and determined. Further, that the issue for determination in this matter is ownership. They reiterate that the applicants will not suffer any prejudice since the question of ownership is highly contested.
11. For the avoidance of doubt, I will reproduce the order issued on July 26, 2021 which is sought to be set aside, varied or discharged:

The application dated July 16, 2021 to be heard first. In view of the prevailing orders of *status quo* in this matter, I shall grant the applicant prayers no 2 and 5 until September 27, 2021 when the application will be heard *inter partes*. The respondents/intended respondents to file and serve their replies within 14 days and the applicants have leave to file and serve a further affidavit within 14 days of service.”

12. I will also reproduce the prayers nos 2 and 5 referred to above, in respect to the application dated July 16, 2021:
 - 2) That pending *inter partes* hearing of this application the respondents/interested defendants by themselves (SIC) agent or any person acting at their behalf be restrained by way of interim injunction from constructing roads within parcels nos 10425, 10424, 3784/4, 7815/1 and 8786.
 - 5) That these orders be served upon the OCS Athi River Police Station for compliance.”
13. On discharging of orders of injunction, order 40 rule 7 *Civil Procedure Rules*, 2010 provides *inter alia*:

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



14. From the court records, I note the impugned orders were made when the applicants' counsel and other counsels were present. Further, the court proceeded to provide directions on the application dated the July 16, 2021. It is not in dispute that there were already existing orders of *status quo* pending outcome of this suit, which were issued in this matter on July 19, 2018. Further, the fulcrum of the dispute herein which involves many parties revolves around ownership of the suit land. It has also emerged that there have been two other related lawsuits determined by Justice Angote and Justice Komingo in respect to the suit lands which are mentioned above. Further, it is worth noting that despite existence of the status quo orders issued on July 19, 2018, the applicants commenced to prepare to upgrade the roads on the suit lands to Bitumen Standards. It is my considered view that since the court already granted directions on the application dated July 16, 2021, I find that the applicants ought to have filed their replies as directed to enable the court make a just determination of the impugned application and not seek the setting aside of the said orders.
15. In the case of *Ochola Kamili Holdings Ltd v Guardian Bank Ltd* [2018] eKLR, it was held that:
- The court is alive to the fact that interlocutory injunction, being an equitable remedy, would be discharged upon being shown the person's conduct with respect to the matter pertinent to the suit does not meet the approval of the court which granted the orders which is the subject matter and especially where a party upon getting injunction orders sits on the matter and uses the orders to the prejudice of the opponent. The orders of injunction are meant to preserve the subject matter Not to oppress another party nor should an injunction be used to economically oppress the other party or to deny justified repayment of outstanding loan. That once such a post-injunction behavior is exposed it would in my view be a ground to discharge an injunction because the order obtained would be an abuse of the purpose for which the injunction was obtained. No court would allow its orders to be used to defeat the ends of justice.”*
16. Based on the facts as presented while relying on order 40 Rule 7 of the Civil Procedure Rules as well as associating myself with the decisions cited, I am of the view that since there are *status quo* orders that has been in existence since 2018 pending the outcome of the suit, the orders issued on July 26, 2021 should subsist until the application dated July 16, 2021 is heard and determined. In the interest of justice, I direct that the application dated July 16, 2021 be expeditiously set down for *inter partes* hearing within twenty one (21) days from the date hereof, failure of which the orders issued on July 26, 2021 will stand vacated.
17. In the circumstance, I will proceed to dismiss the application dated August 2, 2021. Costs will be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 19TH DAY OF SEPTEMBER, 2022

CHRISTINE OCHIENG

JUDGE

