



Weru & another v Recha & 3 others; Absa Bank Kenya Plc (Interested Party) (Environment and Land Case Civil Suit E195 of 2022) [2022] KEELC 15641 (KLR) (20 December 2022) (Ruling)

Neutral citation: [2022] KEELC 15641 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT E195 OF 2022
LN MBUGUA, J
DECEMBER 20, 2022**

BETWEEN

MWANGI IRUNGU WERU 1ST PLAINTIFF

ASSUMPTAH WANJIRU WERU 2ND PLAINTIFF

AND

JOHN WALKER MAKHANU RECHA 1ST DEFENDANT

CHIEF LAND REGISTRAR 2ND DEFENDANT

NAIROBI CITY COUNTY GOVERNMENT 3RD DEFENDANT

HON ATTORNEY GENERAL 4TH DEFENDANT

AND

ABSA BANK KENYA PLC INTERESTED PARTY

RULING

1. There are 2 applications for determination in this matter, both having been brought forth by the plaintiffs. The first one is dated June 2, 2022 seeking injunctive orders against the defendants, while the second one is an application for contempt dated June 23, 2022.

The Application Dated June 2, 2022.

2. In the above application, the plaintiff is seeking a temporary order of injunction restraining the 1st Defendant either by himself, his agents, servants and or anyone acting on his behalf from trespassing into, excavating, developing, further developing, building or in any other manner interfering with the Plaintiff's peaceful possession of Land Reference No 13872/8; That the officer commanding Karen Plains Police station be directed to ensure enforcement of the orders granted by this Honourable court;



- That the 2nd Defendant be ordered to file in court and furnish the Plaintiffs with a report giving the history of the root title of the suit parcel of land being Land Reference Number 13872/8; and That the 3rd Defendant be ordered to file in court and furnish the Plaintiffs with the details of all entities and individuals that have paid rates with respect to the suit parcel of land being land reference No 13872/8.
3. The Application is supported by the 1st Plaintiff's supporting affidavit sworn on June 2, 2022 and his further affidavit sworn on October 13, 2022. He avers the plaintiffs are the registered owners of the suit premises, having purchased the same at a price of Kshs 17 million. The plaintiffs have been receiving rates demands from Nairobi City Council and paying annual land rent to the Ministry of lands and planning. However, on March 10, 2022, the 1st Plaintiff was informed that the rate payer had been changed to the 1st Defendant.
 4. The plaintiffs contend that on September 17, 2021, they learnt from their caretaker Mr Stanley Mbatia that the gate to the suit property had been destroyed and that 1st Defendant had invaded the land. The plaintiffs reported the matter to the police. The plaintiffs further contend that official searches conducted on the titles to the suit land on December 19, 2021 and on May 19, 2022 show that they are still the registered proprietors of the suit land.
 5. The 1st Defendant opposed the application by way of the amended statement of grounds of opposition dated 21st day of June 2022 and his replying affidavit sworn on June 30, 2022. He contends that he holds a certificate of title No 1R 124770, being LR No 13872/8 as delineated on land survey plan No 222584 after purchasing the same from the Maasai community of Karen plains Manyatta through their leader Mzee Sarone Ole Riamet. He further states that upon the release of the title in his name, he went to take possession of the suit property on September 17, 2021 but the Plaintiff protested prompting him to file a report at Karen Police Station. He added that he pays rent and rates and has been enjoying quiet possession but the suit property was invaded by the Plaintiffs in June 2022.
 6. The Defendants did not file any submissions. The Plaintiffs filed written submissions dated October 13, 2022 which I have duly considered.
 7. The issue falling for determination is
 - (i) Whether the Plaintiffs have met the criteria for granting the interlocutory injunctions, and
 - (ii) Whether the orders sought to compel the 2nd and 3rd Defendants to file records pertaining to the suit land are warranted.
 8. The Principles for the grant of interlocutory injunctions were set out in the case of *Giella v Cassman Brown Limited* (1973) EA 358 that;
 - (i) The Applicant must establish a *prima facie* case with probability of success;
 - ii) The Applicant must demonstrate that he will suffer imminent irreparable harm if the injunction is not granted (irreparable injury which cannot adequately be compensated in damages); if the court is in doubt, then the principle of balance of convenience applies.
 9. This is a case where both the Plaintiffs and the 1st Defendant claim ownership over the suit property. To this end plaintiffs have a certificate of title issued on August 17, 2015, while the 1st Defendant also has title dated June 3, 2021 and he has filed a counterclaim to the suit land. As things stand, this court cannot deal with contested issues of ownership at the interlocutory stage. Further, each claimant appears to be a rate payer in respect of the suit property. In such circumstances, the appropriate orders to give relate to the maintenance of status -quo.



10. In the case of *John Obare v Moses Adagala* [2016] eKLR, the court in giving orders geared towards preservation of the suit property stated thus;
- “ Even though the court is not expected at this interlocutory stage to make conclusive findings of facts and the law, the evidence so far availed shows there is need to maintain the *status quo* obtaining at the stage of filing these proceedings to enable the status of the suit property, be it plot 399A, 399D or 399 remains unchanged as the parties litigate on the issues before the court.....”.
11. In the circumstances, and in the interest of justice, and in order to protect the suit land from interference by the competing parties, the *status quo* order is hereby issued restraining either of the parties from carrying out any activities on the suit property, but the plaintiff shall be in charge of the said land.
12. On the orders sought compelling the 2nd and 3rd Defendants to furnish the Plaintiffs with various documents, I find that the 2nd and 3rd defendants have not opposed the said prayers, nevertheless, I find that such prayers are unwarranted at this stage. The plaintiffs should use the platform of pretrial processes to gauge the documents they would need for the trial, whereby they would be at liberty to seek a notice to produce or request for summons compelling attendance of any particular witness. After all, this court does not wish to run the risk of analyzing evidence which ought to be produced during the infancy stage of the suit.
13. In the circumstances; the application dated 2.6.2022 is hereby partially allowed in the following terms; That an order of *status quo* is hereby issued during the lifespan of the suit to the effect that none of the claimants (plaintiffs and 1st defendant) shall carry out any developments on the suit property, the said land shall not be alienated, but the plaintiff shall remain in charge of the said land. The plaintiff is awarded costs of the application.

The Application Dated June 23, 2022.

14. The said application is brought under section 49(1) (a) of the *Contempt of court Act*; section 5 of the *Judicature Act* (cap 8 Laws of Kenya); sections 4(2),13,14,18 & 19 of the *Environment and Land Court Act* (No 19 of 2011); order 40 rule 3(1) and order 51 rule 1 of the *Civil Procedure Rules, 2010*; Rule 81(4) of the *England Civil Procedure (Amendment No 2) Rules, 2010*; Rule 81(4) of the *England Civil Procedure (Amendment No 2) Rules, 2012*, the inherent powers of this Honourable court and all other enabling provisions of the law).
15. The Plaintiff seeks orders committing the 1st Defendant to a 6-month jail term or to pay a fine for being in contempt of this court’s order issued on June 7, 2022. The application is based on grounds on its face and on the 1st Plaintiff’s supporting affidavit sworn on June 23, 2022. He deponed that on June 7, 2022, this court issued orders restraining the 1st Defendant from further engaging on construction work on the suit parcel of land but despite service of the orders upon him, he has refused to abide by them and instead elected to continue with construction on the suit land. He annexed photographs of the suit land to buttress his claim.
16. The application is opposed by the 1st Defendant by way of grounds of opposition dated July 13, 2022 stating that the prayers sought do not satisfy the test for grant of the committal orders sought in terms of the *Contempt of Court Act, 2016* and that it contravenes mandatory provisions of the *Evidence Act* and the *Data Protection Act*.



17. The 1st Defendant also filed a replying affidavit sworn on July 15, 2022 in opposition to the application. He deponed that he commenced construction on the suit land in March 2022 following issuance of the necessary legal and regulatory approvals from the various Government of Kenya authorities and agencies as required by law but he stopped construction following this court's orders of June 7, 2022.
18. He averred that the pictures annexed by the Plaintiffs represent the status of construction work up to June 3, 2022 and that if there was actual construction going on, it would have been captured by the Plaintiffs' CCTV cameras as he resides on the adjacent parcel of land known as LR 13872/7.
19. The plaintiffs filed written submissions dated October 13, 2022 which I have considered.
20. On June 7, 2022, this court gave orders that *status quo* be maintained such that "no further construction would be undertaken on the suit property." Further, on July 18, 2022, order 4 of the Application dated June 2, 2022 was granted to ensure compliance with the *status quo* orders. The Plaintiffs claim that the 1st Defendant is in contempt of the *status quo* orders since he has carried on with construction on the suit land. The 1st Defendant admits that he was served with the orders of June 7, 2022 but contends that he is not in contempt as there is no actual construction exhibited in the photographs annexed by the Plaintiffs.
21. In *Republic v National Environment Tribunal, Ex-parte Palm Homes Limited & another* [2013] eKLR, the court stated that:

"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.."
22. At the time this court issued the *status quo* orders herein, the 1st defendant had not commenced construction as exhibited in the photographs in the 1st Plaintiff's affidavit sworn on June 2, 2022. The said photographs show building materials, an excavator and an iron sheet site house. A perusal of the photographs which were annexed to the 1st Plaintiff's supporting affidavit sworn on June 23, 2022 shows that there is definitely a construction on the suit land. This shows that the 1st Defendant undertook construction during the pendency of the orders given by this court.
23. In the case of *Mutitika v Baharini Farm Limited* [1985] KLR, the Court of Appeal held that;

"In our view, the standard of proof in contempt proceedings must be higher than proof on the balance of probabilities, almost but not exactly, beyond reasonable doubt..."
24. This is a case whereby the 1st defendant has not commented on the initial photographs availed by the plaintiff at the time the suit and the 1st application were filed. I find that the Plaintiff has established to the required standard that the 1st Defendant is in breach of the *status quo* orders issued on June 7, 2022.
25. Courts have held that court orders must be enforced. The Court of Appeal in *AB & another v RB*, Civil Application No 4 of 2016 [2016] eKLR cited with approval the Constitutional Court of South Africa's decision in *Burchell v Burchell*, Case No 364 of 2005 where it was held:

"Compliance with court orders is an issue of fundamental concern for a society that seeks to base itself on the rule of law. The *Constitution* states that the rule of law and supremacy of the *Constitution* are foundational values of our society. It vests the judicial authority of



the state in the court and requires other organs of the state to assist and protect the court. It gives everyone the right to have legal disputes resolved in the courts or other independent and impartial tribunals. Failure to enforce court orders effectively have the potential to undermine confidence in recourse to law as an instrument to resolve civil disputes and may thus impact negatively on the rule of law.”

26. In conclusion, I find that the 1st defendant is guilty of contempt of court orders issued by this court on June 7, 2022, thus the application dated June 23, 2022 is allowed in terms of prayer No 2. The plaintiff is awarded costs of the application.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 20TH DAY OF DECEMBER, 2022 THROUGH MICROSOFT TEAMS.

LUCY N MBUGUA

JUDGE

In the presence of:-

Kamwaro for Plaintiffs/Applicants

Lamanya for 3rd Defendant

Court assistant: Eddel

