



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MIGORI

ELC CASE NO. 42 OF 2020

ZABLON NDISIO OBUYA OWUOR.....PLAINTIFF/APPLICANT

Versus

EUNITA AUMA OGUTU.....1ST DEFENDANT/RESPONDENT

(Sued as the Representative of the Estate of the late HEZRON OGUTU OWUOR)

PATROBAS ONYANGO.....2ND DEFENDANT/RESPONDENT

(Sued as the Representative of the Estate of the late ONYANGO OWUOR)

AUSTIN OKEYO.....3RD DEFENDANT/RESPONDENT

(Sued as the Representative of the Estate of the late ONYANGO OWUOR)

JACOB ONYANGO OWUOR.....4TH DEFENDANT/RESPONDENT

(Sued as the Representative of the Estate of the late RAKARA OWUOR)

LAND REGISTRAR MIGORI.....5TH DEFENDANT/RESPONDENT

LAND SURVEYOR MIGORI COUNTY.....6TH DEFENDANT/RESPONDENT

RULING

1. The present ruling is in regard to a Notice of motion dated 24th July 2020 and duly filed in court on 27th July 2020 under sections 1A,1B,3,3A,3B of the Civil Procedure Act, Chapter 21 Laws of Kenya and Order 51 of the Civil Procedure Rules, 2010 (The application herein). The plaintiff namely **ZABLON NDISIO OBUYA OWUOR** (The applicant) through learned counsel, E. Apondi is seeking orders infra:-

i. **THAT** the honourable court be pleased to issue an order of maintenance of status quo in land parcel numbers Kanyamkago/Kajulu/2442 and 2443 (The 1st and 2nd subdivisions of the suit land respectively). That both the plaintiff and the defendant continue occupying the area that they initially occupied before this suit pending the hearing of the main suit.

ii. **THAT** the costs of this application be on cause.

2. The application is anchored on a (19) nineteen paragraphed supporting affidavit sworn on even date by the applicant, copies of documents marked as “ZNOO-1” to ZNOO -5” and annexed to the affidavit alongside grounds 1 to 18 set out on its face. Briefly, the applicant complains inter alia, that he is the registered owner of the suit land, LR NO. KANYAMKAGO/KAJULU/153 measuring approximately one six decimals three hectares (16.3 Ha) in area together with the late Hezron Ogutu Owuor (Deceased 1) Onyango Owuor (Deceased 2) and Rakara Owuor (Deceased 3), each of them owing a quarter (1/4) share as proprietors in common thereof. That the said shares exclude zero decimal two hectares (0.2 Ha) in area which form the road passing through the suit land. That the 1st defendant/respondent is the only surviving wife of the deceased 1 who passed on sometime on 17th June 2008 while the 2nd and 3rd defendants/respondents are the 1st and 3rd surviving sons respectively of deceased 2 who passed on sometime in the year 1999 while the 4th defendant/respondents is the only surviving son of deceased 3 who passed on sometime in the year 2017.

3. The applicant further complains that sometimes on 15th September 2015, he applied for the suit land to be partitioned by the 6th defendant/respondent to enable him (applicant) have his own distinct parcel of the land. That the partition was carried out with an error in the acreage as shown in the title deed, green card (ZNOO-3a) and mutation form (ZNOO-2). That the 6th respondent attempted a visit to the suit land to establish the boundaries of the same to prevent any encroachment but the sons of the deceased 2 obstructed the exercise. That the 3rd respondent has since moved to and started developing the parcel initially occupied by the applicant, thus precipitating the instant application.

4. The 1st, 2nd, 3rd and 4th respondents through Messrs Okongo, Wandago and Company Advocates opposed the application and sought its dismissal with costs in their forty (40) paragraphed joint replying affidavit sworn on 31st August 2020 by the 2nd respondent and filed in court on 1st September 2020. They deposed inter alia, that they are not the personal representatives of the estates of deceased 1, deceased 2 and deceased 3 since no grant of letters of administration intestate, grant of probate or any other grant of representation under the Law of Succession Act Chapter 160 Laws of Kenya has been made to them. That therefore, the suit inclusive of the application is fatally and irredeemably incompetent as well as violates the mandatory provisions of Order 4 (4) and (5) of the Civil Procedure Rules, 2010.

5. The 1st, 2nd, 3rd and 4th respondents further deposed that the applicant's registered title to LR NO. Kanyamkago/Kajulu/2442, a first subdivision of the suit land is unlawful and irregular hence an illegality which is defeasible at law. That the application has not been established and lacks merit. An authority to act, plead and or swear processes dated 24th August 2020 by the 1st, 3rd, and 4th respondents is in support of the affidavit.

6. In a fourteen (14) paragraphed further affidavit sworn on 13th November 2020, the applicant deposed, inter alia, that the 1st, 2nd and 3rd and 4th respondents all have beneficial interest in the estates of deceased 1, deceased 2 and deceased 3. That he never collided with the 5th and 6th respondents to commit or further any illegality as alleged in the replying affidavit. That the respondents will not be prejudiced in any way and that the orders sought in the application be granted in the interest of justice.

7. It is worthy to note that the applicant originated the suit by way of a plaint (Fast Track) of even date simultaneously filed with application. The reliefs sought therein include;-

a) An order to issue from this honourable court for the 5th and the 6th defendant to rectify the register, mutation form and the certificate of title for the acreage of the land parcel no. Kanyamkago/Kajulu/2443 to read 4.04 hectares instead of the 2.79 hectares that is indicated in the register and consequently rectify the register and the mutation form for the acreage of land parcel no. Kanyamkago/Kajulu/2442 to read 12.12 hectares instead of the 13.3 which is indicated in the register and the mutation form.

b) An order to issue directing the 5th and the 6th defendant to visit land parcel no. Kanyamkago/Kajulu/2443 and 2442 and establish their respective boundaries thereof.

8. On 9th December 2020, the 1st, 2nd, 3rd, and 4th respondents' counsel sought and was granted leave to file and serve a statement of defence out of time herein. The order was granted to meet the ends of justice as envisaged under **Articles 48 and 50 (1) of the Constitution of Kenya, 2010**.

9. On the same date, the court directed that the application be argued by way of written submissions; see Order 51 Rule 16 of the Civil Procedure Rules, 2010 and Practice Direction number 33 of the Environment and Land Court Practice Directions, 2014.

10. In his four (4) paged submissions dated 13th November 2020 duly filed in court on even date, learned counsel for the applicant made reference to the orders sought in the application, the triple conditions for the grant of orders of interlocutory injunction as was laid down in **Giella =v= Cassman Brown and Company Ltd (1973) EA 385** inclusive of a prima facie case as defined by the Court of Appeal in **Mrao Ltd =vs= First American Bank of Kenya and 2 others (2003) KLR 125 and Paul Gitonga Wanjau =vs= Gathuthi Tea Factory Company Ltd and 2 others (2016) eKLR**. Counsel also referred to **Ali Kitsao Katana =vs= Kassim Mohammed Omar and 5 others (2018) eKLR** that the guiding principle of the overriding objective is that the court should do justice to the parties before it. To that extent, counsel urged this court to grant the orders sought in the application in the interest of justice.

11. In a seven (7) paged submission dated 15th January 2021 and duly filed on even date, learned counsel for the 1st, 2nd, 3rd and 4th respondents, too, made reference to the orders sought in the application, cited **Giella and Mrao Ltd cases (supra) alongside Jaj Super Power Cash and Carry Ltd =vs= Nairobi City Council and 2 others Nairobi CACA No. 111 of 2002, Kamau Mucuha =vs= Ripples Ltd (1993) eKLR and Noor Mohammed Jannohamed =vs= Kassamali Virji Madhani (1953) EACA 8**, on injunction and status quo. That in the instant application, the orders sought would not serve the purpose as envisaged in the cited authorities herein.

12. Counsel further submitted that the 1st, 2nd, 3rd, and 4th respondents are not lawful personal representatives of the estates of deceased 1, deceased 2 and deceased 3 in respect of the suit land. Reference was made to, inter alia, **Article 159 (2) of the Constitution (supra)**, **sections 45 (1), 82 (9) of the Law of Succession Act Chapter 160 Laws of Kenya**, **section 2 of the Land Registration Act, 2016 (2012)**, **section 56 (a) of the Land Act, 2016 (2012)**, **Kenya Pipeline Company Ltd =vs= Glencore Energy (UK) Ltd (2015) eKLR** and **Muiti Line Motors (K) Ltd =vs= Migori County Government (2019) eKLR**.

13. I have duly considered the entire application, the replying affidavit thereto, and the rival submissions including all the authorities cited therein. On that score, has the applicant established his case for the grant of the orders sought in the application?

14. The application is generated under **sections 1A, 1B, 3, 3B and Order 51 (supra)** and indeed, I note the mandate of the court as stated thereunder; see also **Ali Katana case (supra)** which I hereby endorse without any reservation.

15. Additionally, section 3 of the Environment and Land Court, (ELC) Act, 2015 (2012) provides for the overriding objective. The bottom line thereof is to meet the ends of justice as anchored in **Articles 48, 50 (1), 25 (c) and 159 (2) of the Constitution (supra)**.

16. It is common ground that the applicant and the respondents through their respective counsel submitted on the threshold for the grant of injunctive relief. I am conscious of the triple requirements in that regard as captured in the famous case of **Giella (supra)** and subsequent pronouncements, among them, **Paul Wanjau and Noor Janmohammed cases (supra)**.

17. It is well settled that the said requirements are the pillars on which rests the foundation of any orders of interlocutory or permanent injunctions; see **Nguruman Ltd =vs= Jean Bonde Nielsen and 2 others. (2014) eKLR**.

18. Besides, the principal order sought in the application is the maintenance of status quo over the 1st and 2nd subdivisions of the suit land. The **Concise Oxford English Dictionary 12th Edition at page 1411** defines the term “**Status quo**” thus;

“The existing state of affairs”

19. Similarly, in the **Black’s Law Dictionary 10th Edition at page 1633**, the term “**status Quo**” means;-

“The situation that currently, exists”

20. **At section 13 (7) (a) of the ELC Act (supra)**, this court is mandated to grant interim preservation orders. Essentially, status quo order is not excluded thereby.

21. The applicant instituted the instant suit and the application for the enforcement of his right to property as envisaged under **Articles 22 (1) and 40 of the Constitution (supra)**. This court has the sole discretion to grant any conservatory order including status quo in the nature of lis pendens doctrine as sought in the application and envisioned in **Article 23 (3) (c) of the same Constitution**.

22. It is trite law that the doctrine of lis pendens is meant to maintain the status quo over the property, which is the subject matter of a pending suit until after the final determination of the suit or until the suit in any other manner terminated; see **Ogada =vs= Mollin (2009) KLR 620 at 635** paragraph 4.

23. To that end, I find that the issues in dispute in this suit are highly contested as revealed in the plaint and the application. The 1st and 2nd sub divisions of the suit land deserve preservation in the terms sought in the application pending the hearing and determination of the suit on merits. I find the application merited to meet the ends of justice in the obtaining circumstances.

24. A fortiori, prayer number 3 namely an order of status quo as sought in the application dated 24th July 2020 duly filed on 27th July 2020, be and is hereby granted.

25. Costs of the application be in the cause.

Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 4th day of February, 2021

G.M.A. ONGONDO

JUDGE

In presence of :-

Mr. D. Adawo holding brief for Ms. Apondi learned counsel for the applicant

Mr. M. Odero learned counsel for the 1st to 4th respondents

Tom Maurice - Court assistant