



**Mambo (Administrator of the Estate of Mohamed Mambo) & 3 others v Hawkins & 4 others
(Environment & Land Case 247 of 2021) [2024] KEELC 485 (KLR) (6 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 485 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
ENVIRONMENT & LAND CASE 247 OF 2021
AE DENA, J
FEBRUARY 6, 2024**

BETWEEN

**HALIMA MOHAMED MAMBO (ADMINISTRATOR OF THE ESTATE OF
MOHAMED MAMBO) 1ST PLAINTIFF
KADIRI JUMA KIMBIRWA (ADMINISTRATOR OF THE ESTATE OF JUMA
KIMBIRWA) 2ND PLAINTIFF
NASORO JUMA MWAWALI (ADMINISTRATOR OF THE ESTATE OF
SULEIMAN MWAWALI) 3RD PLAINTIFF
MWINYI JUMA BUGU (ADMINISTRATOR OF THE ESTATE JUMA
BUGU) 4TH PLAINTIFF**

AND

**RICHARD LIVINGSTONE HAWKINS 1ST DEFENDANT
JOHN EDWARD LESLIE 2ND DEFENDANT
ORBIT DEVELOPERS LIMITED 3RD DEFENDANT
BHUPINDER SINGH KNOWLE 4TH DEFENDANT
GURBUX SINGH NAGI 5TH DEFENDANT**

RULING

- 1 The Applicants herein seek the following orders;
 - a. Spent
 - b. Pending the hearing and determination of this application, a temporary injunction do issue restraining the 3rd Defendant/Respondent whether by itself, its agents, servants or anyone



claiming through it from trespassing upon, remaining upon, continuing constructing on it and interfering with the status of the land parcels No Kwale/Diani Beach Block/102 and Kwale/Diani Beach Block/103.

- c. Pending the directions of this suit being given, a temporary injunction do issue restraining the 3rd Defendant/Respondent whether by itself, its agents, servants or anyone claiming through it from trespassing upon, remaining upon, continuing constructing on it and interfering with the status of the land parcels No Kwale/Diani Beach Block/102 and Kwale/Diani Beach Block/103.
 - d. The officer in charge of the police station Diani police help the Applicants ensure compliance with orders [b] and [c]
 - e. Costs of this application be provided for.
- 2 The application is premised upon grounds set out thereon and the supporting affidavit jointly sworn by all the Plaintiffs. It is averred that the Plaintiffs are the joint registered proprietors of the whole of the land parcels Kwale/Diani Beach Block/102 and 103 having obtained the same from their fathers mambo Mohamed and Juma Saidi Bugu. The two persons were awarded the land vide a judgement delivered on 28/9/2008 and which decision has not been appealed or set aside.
 - 3 It is averred that the 3rd Defendant has without the consent of the Plaintiffs invaded the suit parcels and begun development of the same despite status quo orders being issued by the court over the suit properties. The Plaintiffs state that a report was made to the police over the said construction vide OB No 22/20/01/23. That unless the 3rd Respondents and its agents are stopped from the said construction the face of the property will be distorted and the Plaintiffs are bound to suffer irreparable loss and harm.
 - 4 In response to the application, the 3rd Defendant filed a replying affidavit sworn by Peter Burugu its Managing Director. The 3rd Defendants aver that they are the registered owners as lessees from the Government of Kenya of the suit properties since 29/5/1980. That since the time of such registration they have continued to make payments of both rent and rates to both the National and County government. The deponent states that sometime in November 2009 he was informed that the suit properties were being transacted upon. That after inquiry from the Lands Registry it was confirmed that the said parcels had indeed been converted to freehold and were registered in the names of the Plaintiffs.
 - 5 That it was upon further inquiry by the 3rd Respondents Counsel on record that it was discovered that the Plaintiffs had acquired the land through adverse possession. That an application to set aside the judgement awarding the Plaintiffs the suit parcels was made and the same was allowed by the court. That the allegations by the Plaintiffs that the judgement has never been appealed against are therefore falsified and are misleading to the court. It is stated that the status quo orders issued by the court have been abided by and the need for the injunctive orders sought is not necessary. The 3rd Respondent however states that in the event that the said orders are granted, the Plaintiffs/Applicants be ordered to pay a sum of Kshs 500,000,000/- being the estimated cost of the project that was to be undertaken on the suit property as a substantial sum has been used in sourcing materials and contractors for the project.
 - 6 The 3rd Respondent states that given that there are two titles, the court should consider and give priority to the title that is first in line in terms of registration. It is lastly stated that the application is geared towards delaying the hearing of the suit and should therefore not be allowed by the court.



- 7 The Applicants filed a further affidavit sworn by Mwinyi Juma Bugu on 25/9/2023. It is averred that as opposed to the averments raised by the 3rd Respondent in its affidavit in response to the application, the court in its judgement of 28/9/2009 did not blanketly give the suit properties to the original plaintiffs but rather gave each property to a specific plaintiff. That an order was further made for the properties to remain in the condition that they were in until the court directed otherwise. It is further stated that the orders allegedly made on 5/3/2010 vacating the orders made in the judgement were never effected on the green cards. The deponent states that he saw the developments on the suit property sometime in the year 2021 and the 3rd Defendant was stopped from making further developments on the same vide orders of the court dated 8/3/2023. The said orders have not been adhered to. A sum of Kshs 100,000,000/- is sought as a deposit for compensation for damages incurred by the plaintiffs through the denial to use their property.
- 8 The submissions on record by both parties have been considered by this court.
- 9 The application herein is anchored under Order 40 Rule 1(a) of the Civil Procedure Rules which provides: -
1. 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) 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.
- 10 The above provision of law was well summarised in the celebrated case of *Giella v Cassman Brown & Co. Ltd* where the criteria for grant or refusal of injunctive orders was laid down. The said criteria has been reaffirmed in a number of authorities and which include *Kibutiri v Kenya Shell*, Nairobi High Court, Civil Case No 3398 of 1980 (1981) KLR, where the Court held that: - “The conditions for granting a temporary injunction in East Africa are well known and these are: First, the Applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury which might not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience. See also *E.A Industries v Trufoods* (1972) EA 420.”
- 11 I have perused the pleadings before court and the proceedings preceding the application. I do not seem to find the *status quo* order referred to by the Plaintiffs/Applicant as having been issued by this court on 8/3/23. The court in the proceedings of 15/3/2023 urged Counsels on record to visit the suit property in order for them to appraise themselves of the situation on the suit property. The court notes that the Applicants counsel noted developments on the land in disregard of the orders issued by Justice Yano. The developments are what necessitated the instant application.
- 12 From the documentary evidence on record, the Plaintiffs have produced before court title deeds over the suit properties issued on 4/4/2019. The 3rd Respondent has on the other hand produced a certificate of lease which was issued on 29/5/1980 and indicates the 3rd Respondent as the owner of the suit properties. In order for the court to make a determination on whether a prima facie case has been established by the Applicants, the court will definitely have to delve into issues of ownership of the suit properties. As indicated above, the suit properties have two titles being distinct in nature in the



sense that one is a freehold while the other is a leasehold. The Court can only make a determination as to ownership after both parties ventilate their case through a hearing.

13 I have also noted the invitation for the deposit of the sum of Kshs 100,000,000/- for compensation for damages allegedly incurred by the Plaintiffs through the denial to use their property. My view this is a matter for the main hearing.

14 Orders of injunction are a discretion of the court as they are issued after the court is satisfied that the threshold set in the *Giella Case*[*supra*] has been met. This position has been taken by other courts. In the case of *Daniel Kipkemoi Stele v Kapsasian Primary School & 2 others* [2016] eKLR Munyao J. stated as follows:

“... the grant or not of an order of injunction is upon the discretion of the court. However, like all other discretions, the same must be exercised judiciously.”

15 As it is, the 3rd Defendant is continuing with the development of the suit properties if the status quo report by their Counsel is anything to go by. I am inclined towards pursuing the doctrine of maintaining the status quo of the suit properties until this matter is heard and determined.

16 *Black's Law Dictionary*, Butter Worths 9th Edition, defines Status Quo as a Latin word which means “the situation as it exists”. The purpose of an order of *status quo* was stated in *Republic v 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...”

17 In the interest of justice, it is proper for things to remain as they are pending hearing and determination. Accordingly, the Court issues an order for *status quo* and which for the avoidance of doubt shall entail the following:

1. That there shall be no further constructions or development at the disputed parcels being Kwale/Diani Beach Block/102 and Kwale/Diani Beach Block/103. Any constructions which are ongoing to forthwith cease.
2. The said status quo to remain in force pending the hearing and determination of this suit.
3. Each party to bear its own cost.

Orders accordingly.

RULING DATED SIGNED AND DELIVERED THIS 6TH DAY OF FEBRUARY 2024.

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A.E DENA

JUDGE

Mr. Osodo for Plaintiffs/Applicants

Mr. Ali for 3rd Defendant/Respondent

Mr. Daniel Disii – Court Assistant

