



**Mallo & another v Nairobi City County & another (Environment & Land  
Petition E010 of 2024) [2024] KEELC 5240 (KLR) (8 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 5240 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND PETITION E010 OF 2024**

**JA MOGENI, J**

**JULY 8, 2024**

**IN THE MATTER OF ARTICLES 10, 42 AND 70 OF THE CONSTITUTION,  
SECTION 3(3) OF THE ENVIRONMENT MANAGEMENT & COORDINATION ACT,  
SECTION 13(2) & 7 OF THE ENVIRONMENT & LAND COURT ACT**

**AND**

**ALL OTHER ENABLING PROVISIONS OF THE LAW**

**BETWEEN**

**BENARD MALLO ..... 1<sup>ST</sup> PETITIONER**

**PAULINE ANZENZE ..... 2<sup>ND</sup> PETITIONER**

**AND**

**NAIROBI CITY COUNTY ..... 1<sup>ST</sup> RESPONDENT**

**LA TANSA PROPERTIES LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. Before this Court for determination is the Petitioners/Applicants' Notice of motion Application dated 12/04/2024 brought pursuant to Section 1A, 1B & 3A of Civil Procedure, Articles 10, 42 & 70 of *the Constitution*, Section 3(3) of the Environment Management & Coordination Act, Section 13 (2) & 7 of the Environment & Land Court Act and all other enabling provisions of the Law. The Petitioners/Applicants seeks the following orders:

1. Spent.
2. Spent.



3. That pending the hearing and determination of this Petition the Respondents be restrained from continuing with the construction activities on Plot No. 36/1/790 Eastleigh.
  4. That the 2<sup>nd</sup> Respondent is illegally constructing on LR. No. 36/1/790 and not LR. 36/1/909 as displayed on the site board.
  5. That the officer in charge of the nearest police station do ensure that court orders are complied with.
  6. That the Honourable Court do grant any further orders it deems fit to grant.
  7. Cost of this Application be provided for.
2. The Application was premised on the grounds stated in paragraph (1) – (5) on the face of the Application and the Supporting Affidavit by Benard Mallo, the 1<sup>st</sup> Petitioner/Applicant herein sworn on 12/04/2024. I do not need to reproduce the same.
  3. The Petitioners’ counsel brought to the Court’s attention that the 1<sup>st</sup> Respondent filed Preliminary Objection without filing a Notice of Appointment. Mr. Salim, appearing for the 1<sup>st</sup> Respondent confirmed that he had not filed a Notice of Appointment as at 19/06/2024 when the parties appeared in Court for directions. The Application is therefore not opposed.
  4. On 19/06/2024, the Court gave directions on filing of written submissions to the application and a Ruling date was reserved. By the time of writing this Ruling, none of the parties had duly filed their written submissions.
  5. I have had time to analyze the emerging issues in the Petitioners’ Application. The instant Application relates to the grant of temporary injunctive relief pending the hearing and determination of this Petition.
  6. The substantive law on this matter is Order 40 Rule 1(a) of the Civil Procedure Rules 2010 which provides:

“Where in any suit it is proved by affidavit or otherwise that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongly sold in execution of a decree ... 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.”
  7. It was long established and continues to be good Law that temporary injunctions are granted upon the satisfaction of tripartite conditions to wit: whether the Applicant has established a prima facie case; whether upon examination of the prevailing circumstances it becomes clear that the Applicant stands to suffer irreparable loss that the Respondents would be hard pressed to assuage by an award of damages and finally, where there was still doubt, it would be in order to consider in who’s favour the balance of convenience tilted. These principles were established in *Giella vs. Cassman Brown & Co. Ltd* 1973 E.A 358.
  8. While discussing the conditions precedent to obtaining an Order of injunctive relief, the Court of Appeal in *Nguruman Ltd v. Jan Bonde Nielsen & 2 Others*, [2014] eKLR observed that:

“In an interlocutory injunction application, the applicant has to satisfy the triple requirements to:



- a. Establish his case only at a prima facie level.
  - b. Demonstrate irreparable injury if a temporary injunction is not granted, and
  - (c) Ally any doubts as to (b) by showing that the balance of convenience is in his favour.
9. Bearing the above in mind, the first stop of the journey towards my final determination is whether the Applicants have established a prima facie case. A prima facie case was defined in *Mrao Ltd v. First American Bank of Kenya Ltd & 2 Others* [2003] eKLR, where Bosire, JA stated as follows:

“So what is a prima facie case? I would say that in civil cases it is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”
10. The Court of Appeal deliberating what amounted to a prima facie case in *Nguruman (Supra)* made the following comments: -

“We reiterate that in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right, which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. The applicant need not establish title it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right, which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the applicant’s case is more likely than not to ultimately succeed.”
11. Having established the school of judicial thought I ought to abide, I shall now fix my gaze upon this instant application all the while cautioning myself not delve into the intricacies of the case as that is a preserve of the substantive suit.
12. From the evidence before me, a key point of contention in this matter is the construction of the Aziz Towers Residential Apartments by the 2<sup>nd</sup> Respondent at Plot Number 36/1/790 Eastleigh 2<sup>nd</sup> Avenue, Airbase Ward which has encroached to the pedestrian walking path and blocked part of the Galole Street Road. That these activities of the 2<sup>nd</sup> Respondent are not environmentally friendly and safe to the Applicants and other community members as the excavations and blockage of the Galole Street road has interfered with the storm discharge system, sewerage system which is not safe to the Applicants and community members. Additionally, the Applicants aver that their complaints to the 1<sup>st</sup> Respondent in regard to the activities of the 2<sup>nd</sup> Respondents have been ignored and the two have allegedly colluded to interfere with the constitutional rights of the Applicants.
13. In considering the above circumstances, it is better to safeguard and maintain the status quo for a greater justice than to let the status quo be disrupted by not granting the interlocutory injunction and after hearing the application, find that a greater injustice has been occasioned. The guiding principle of the overriding objective is that the court should do justice to the parties before it and their interests must be put on scales.



14. I note that this application was also brought under the provisions of Sections 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.
15. The Black's Law Dictionary, Butter Worth's 9<sup>th</sup> 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.
16. In the case of 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 the existing state of affairs...Status quo must therefore be interpreted with respect to existing factual scenario...”
17. In the case of Kenya Airline Pilots Association (KALPA) v Co-operative Bank of Kenya Limited & another [2020] eKLR, 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.”
18. Having considered the facts that have emerged in this case and the evidence adduced by way of affidavit, it is the view of the Court that apart from preserving the substratum of the subject matter, 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 Petition.
19. 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.”
20. 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.”

21. 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.”

22. 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.

23. Arising from all the above, this Honourable Court proceeds to make the following findings. These findings are: -

- a. That the Court issues an order for status quo to be maintained on the suit property meaning there shall be no further construction or any further construction activities on Plot No. 36/1/790 Eastleigh until this Petition is heard and determined.
- b. That there shall be no further constructions or developments by the Respondents on the suit property and any constructions by the 2<sup>nd</sup> Respondent that is ongoing on the suit property to forthwith cease.
- c. That there shall be maintained peace and tranquility by all the parties and their agents at the suit property at all times during the pendency of this Petition until it is heard and determined.
- d. That the officer in charge of the nearest police station do ensure that court orders are complied with.
- e. Costs shall be in the cause.



24. It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 8<sup>TH</sup> DAY JULY 2024.**

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**MOGENI J**

**JUDGE**

In the presence of:

Mr. Oduor – Petitioners

Mr. Etyng – 1<sup>st</sup> Respondent

Ms. Akinyi holding brief for Mr. Otieno for 2<sup>nd</sup> Respondent

Sagina - Court Assistant

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**MOGENI J**

**JUDGE**

