



**Ong'onga v Chengo & 5 others; Kenya Commercial Bank Limited & another (Interested Parties)
(Environment & Land Case 73 of 2015) [2023] KEELC 17353 (KLR) (4 May 2023) (Ruling)**

Neutral citation: [2023] KEELC 17353 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 73 OF 2015**

EK MAKORI, J

MAY 4, 2023

BETWEEN

OKOMBOLI ONG'ONGA PLAINTIFF

AND

MASHA CHENGO 1ST DEFENDANT

ROBERT GAMBO BUNJU 2ND DEFENDANT

KATANA NGOTI JAMBO 3RD DEFENDANT

CHRISPUS TSOFWA MWENI 4TH DEFENDANT

MAMA FATUMA 5TH DEFENDANT

BABU WANJE 6TH DEFENDANT

AND

KENYA COMMERCIAL BANK LIMITED INTERESTED PARTY

MISTAN AUCTIONEERS INTERESTED PARTY

RULING

1. The Defendants' application dated October 12, 2022 is seeking first, to join the 1st and 2nd as interested parties to the suit, and secondly, this court do issue an order of temporary injunction, pending the determination of this suit, to restrain the 1st and 2nd intended interested parties from exercising statutory power of sale over the suit property that is, parcel of land known as Land Reference No 20252/13 Kilifi (hereinafter referred to as the suit property).
2. Parties were directed by this court to file written submissions on the matter. They complied.



3. The record shows that the suit property herein is subject of litigation pitting the plaintiff and the defendants each claiming proprietary rights over it. The plaintiff asserts that he legally purchased the land and took possession of it. The land was later to be placed as security and that it is the 1st intended interested party who did advance a loan to the plaintiff to purchase it. He has defaulted in repayment. The 1st interested party has instructed auctioneers - the 2nd intended interested party to proceed and sell the suit property which was placed a security and therefore the 1st intended interested party is exercising its statutory power of sale under the loan agreement and letter of offer binding it with the plaintiff.
4. The applicant thinks that it will be germane to join the 1st and 2nd interested parties in this suit because the subject matter herein – the suit property is being claimed by the plaintiff and the defendants and that if it's sold, the current suit will be rendered nugatory as there will be nothing to litigate on. The applicant further contends that in the prayer for injunction, the threshold set in *Giella v Cassman Brown* [973] 358 has been achieved.
5. The intended interested parties think otherwise and contend that due diligence was done before a loan facility was accorded to the plaintiff to purchase the suit property herein which was placed as security. Now that the plaintiff has defaulted in repayment, the statutory right of sale accrues and cannot be fettered.
6. The issues that arise for determination is whether the interested parties should be joined in this suit. Moreover, whether a temporary injunction should issue under the circumstances.
7. The law governing joinder of persons in a suit is as stated in the case of *Meme v Republic*, [2004] 1 EA 124:
 - “(i) Joinder of a person because his presence will result in the complete settlement of all the questions involved in the proceedings;
 - (ii) joinder to provide protection for the rights of a party who would otherwise be adversely affected in law;
 - (iii) joinder to prevent a likely course of proliferated litigation.”
8. See also [*Kenya Medical Laboratory Technicians and Technologists Board & 6 others v Attorney General & 4 others*](#) [2017] eKLR, where in the works of Mativo J he stated as follows:

“The test is not whether the joinder of the person proposed to be added as an interested party would be according to or against the wishes of the petitioner or whether the joinder would involve an investigation into a question not arising on the cause of action averred by the petitioner. It is whether the intended interested party has an identifiable stake, or a legal interest or duty in the proceedings.

In determining whether or not an applicant has a legal interest in the subject matter of an action sufficient to entitle him to be joined as an interested party the true test lies not so much in an analysis of what are the constituents of the applicant's rights, but rather in what would be the result on the subject-matter of the action if those rights could be established.

It is a mandate of the court that as far as possible all matters in controversy between the parties should be completely and finally determined and all multiplicities of legal proceedings concerning any of the matters be avoided. In this regard, it would be appropriate and in the interest of justice that all matters touching and concerning the subject matter of



the suit in the case at hand be determined finally and completely to avoid litigating over the same matters again.”

9. The subject matter in this suit is Land Reference No 20252/13 Kilifi. The Plaintiff and the defendants are actively engaged in ownership wrangles over it. It has been raging since this matter was filed in the year 2015. The substratum of the suit property it seems will change with an impending auction of it on the offing. The 1st intended interested party extended a loan facility to the plaintiff to purchase the very same suit property. The applicants contend they live, work on and occupy it as their known home. If it is sold, it will defeat the purpose of the current litigation.
10. Significantly, the 1st intended interested party has a legal stake on the subject matter by virtue of the legal charge over the suit property which is in place and in my view the joinder of the 1st interested party will be a necessary to avoid a proliferation of suits arising from the intended sale. The 2nd intended interested party on the other hand is a mere agent of the 1st Intended Interested Party who need not be joined because it has no stake over the suit property or at all. I will revert to whether this limb on joinder succeeds after considering the remaining issue on issuance of temporary injunction here below and in the final orders.
11. On whether to issue temporary injunction, the applicant has no claim against the intended interested parties. There is no suit-pending seeking specific orders against the intended interested parties by the applicants for this court to consider the test in *Giella vs Cassman Brown* [1973] EA 358.
12. However, in land matters authorities from this court affirms the position that this court can make appropriate orders for status quo to preserve the substratum of the subject matter pending the conclusion of active litigation. This is so because when dealing with land, it is not like any other suit, the subject matter can easily change hands and make recovery or execution process a futility. See for example Onguto J in *Thugi River Estate Limited & Another v National Bank of Kenya Limited & 3 others* [2015] eKLR:

“In land matters the maintenance of status quo order is now literally synonymous with the proceedings. As was held by the Court of Appeal in the case of *Mugah –v- Kunga* [1988] KLR 748, in land matters status quo orders should always be issued for purposes of preserving the subject matter. This court’s practice direction vide Gazette Notice No 5178/2014 have followed suit. Practice Direction No 28(k) is relatively clear. It gives the court the leeway and discretion to make an order for status quo to be maintained until determination of the case. I however take note that the Gazette Notice was issued before this court’s July, 16th 2014 decision.

The end result is that status quo orders will issue not just when the court is prompted by way of formal applications for injunction or conservatory or stay orders: see *Texaco Ltd – v- Mulbery Ltd* [1972]1 WLR 814, but also when the court is of the view that as a case management strategy, it would be more proportionate and appropriate without prejudicing one party but both, to issue a “*status quo*” order.”

13. This is one of those cases where this court thinks that the orders of *status quo* should have issued but a close look at the record reveals that this court - Angote J on 19th of February, 2016 issued temporary injunctive orders restraining the defendants (now applicants) from further entry and or trespass on the



suit property. The ruling is reported as [Okomboli Ong'ong'a v Masha Ngao & 6 others](#) [2016] eKLR the Judge held:

“I have considered the valuation report and I am satisfied, prima facie, that at the time the Plaintiff bought and charged the suit property, there were no structures on the land. If the land had any structures, I doubt that the bank would have used the grant as a collateral if indeed there were people living on the land.

Although the Defendant has claimed the Plaintiff has not abided by the terms of the lease, I am of the view that it is only the Lessor to the land who can complain about non-observance of those terms and not the 1st Defendant.

I have also seen the photographs annexed on the 1st Defendant's Replying Affidavit showing a temporary structure surrounded by two other structures which are not complete.

If indeed the Defendants were on the suit property before the Plaintiff purchased it, then I would have expected to see a photograph of more than one house on the land, which is not the case.

In the circumstances, and in view of the fact that the Plaintiff is the registered proprietor of the suit property, I find and hold that the Plaintiff has established a prima facie case with chances of success.

The Plaintiff is also likely to suffer irreparable loss if the Defendant continues putting up more structures on the land.”

14. This was further followed by yet another ruling by this court Olola J dated July 13, 2017 declining issuance of temporary injunction sought by the defendant/applicants – it is reported as [Masha Ngao & 6 others v Okomboli Ong'ong'a](#) [2017] eKLR, the Judge observed:

“From the foregoing circumstances, it is clear to me that this court made orders on February 19, 2016 restraining the Applicants herein from interfering with the Respondents use, occupation, possession and proprietorship of the suit property. The said orders were to be enforced by the OCPD Kilifi. The said Orders have neither been set aside nor stayed. Instead, the Applicants are now seeking their own counter-injunction to restrain the Respondent from interfering with their stay and occupation of the self-same suit land. In my view, that is inviting the court set to a dangerous precedent. This court will not take that course.¹⁰ It is apparent that the Applicants have refused and/or neglected to comply with the Court Orders issued on February 19, 2016. They are in this court seeking an equitable remedy. As the maxim goes he who comes to equity must come with clean hands. The Applicants hands are heavily tainted and equity thus refuses to come to their aid.¹¹ Accordingly, I hereby discharge the temporary orders granted ex-parte by the Honourable Omollo J in Mombasa on January 19, 2017 and dismiss the application dated the same day with costs to the Respondent.”

15. On moving the Court of Appeal to offset the orders of this court dated January 19, 2017, the Court of Appeal further affirmed the denial of injunctive orders to the applicants and upheld the findings of Angote J (supra), this is reported in [Masha Ngao & 4 others v Okomboli Ong'owa](#) [2018] eKLR.
16. It is then clear and sparkingly so, from the history of this suit that the applicants are not law-abiding citizens who need to be accorded the protection of the law from this court. They have been to this court seeking injunctive orders incessantly and, which this court has declined with sound reasons. This



is what amounts to abuse of the court process. The issue of temporary injunctive orders from the foregoing is a done deal. This court has severally rendered itself on the issue in the manner I have stated above. The Court of Appeal has also spoken about it. The status quo, which should be obtaining on the ground, is that the plaintiff should be the one in occupation of the suit property and not the applicants. The applicants are trespassers on the suit property if at all they are on the ground. This court will not countenance the utter disobedience of court orders. At the end, the joinder of the interested parties will be unnecessary and will be fruitless and vain.

17. The upshot is that application dated October 12, 2022 is hereby dismissed with costs.

DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY IN OPEN COURT ON THIS 4TH DAY OF MAY 2023.

E. K. MAKORI

Judge

In the absence of:

Parties though notified.

NB: This Ruling has been delivered online and sent to the parties email addresses.

