Ndegwa v Thegeru & 3 others (Environment & Land Case 21 of 2023) [2023] KEELC 21259 (KLR) (1 November 2023) (Ruling)

Neutral citation: [2023] KEELC 21259 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MALINDI

ENVIRONMENT & LAND CASE 21 OF 2023

EK MAKORI, J

NOVEMBER 1, 2023

BETWEEN

JULIUS NDEGWA ..... PLAINTIFF

AND

MICHEAL THEGERU ..... 1ST DEFENDANT

AGRICULTURAL FINANCE CORPORATION ..... 2ND DEFENDANT

LAND REGISTAR LAMU ..... 3RD DEFENDANT

THE ATTORNEY GENERAL- MALINDI ..... 4TH DEFENDANT

RULING

1. Application dated March 24, 2023 seeks a temporary injunction to restrain the defendant/ respondents from selling land parcel known as Lamu/Lake Kenyatta 1/7085 pending the hearing and determination of the current suit with costs.

2. The 2nd respondent opposes the application. I have not seen any averments from the 1st, 3rd, and 4th respondents.

3. The applicant avers that he purchased the land from one Ali Nassir Siaka through the 1st defendant, who was his personal assistant when he was serving as a member of parliament Lamu–West. He entrusted the 1st defendant with the duty of dealing with the land in question. The land was later registered under his name on April 29, 2021 and the title deed was duly issued in his name. That on the same day, the 1st defendant maliciously and surreptitiously caused the transfer of the title to his name upon which the 3rd defendant issued a new title in the name of the 1st defendant.

4. Having acquired the land, the 1st defendant approached the 2nd defendant and took a loan facility with it to the tune of Kes 2,000,000/-.

5. The 1st defendant could not clear the loan with the 2nd defendant hence the 2nd defendant put in motion the process of sale of the land placed as security in the exercise of the statutory power of sale.

6. The applicant got wind of the intent of the sale and approached this court seeking the orders in this application. He averred that the transactions leading to the transfer of the land from his name to the 1st defendant were fraudulent and therefore a need to have the title revert to him.

7. The 2nd respondent contended that when granting the 1st respondent the loan facility and placing the land as security, due diligence was done and it was discovered that the land exclusively belonged to the 1st defendant. It was not aware that there was any fraud in its acquisition.

8. The 2nd respondent exercised its statutory right to sell the suit property pledged as security when the 1st respondent failed to make loan payments as agreed. It believes the applicant is determined to restrict this right because of this suit and the orders sought. The 2nd respondent contended that it had established the 1st respondent had a good title since it conducted due diligence before granting the 1st respondent access to the credit facility.

9. What falls for the determination of this court is whether at this stage the court can grant temporary orders of stay. The applicants submitted that the threshold as set in the *Giella v Cassman Brown* [1973] EA 358 has been achieved to warrant the issuance of the orders sought.

10. The applicant believes that the first respondent, who was serving as his assistant and had access to documents because of his job, took advantage of his position to fraudulently transfer the applicant's land to himself and have it pledged as collateral for a loan facility he obtained from the 2nd respondent.

11. The 2nd respondent averred that the title placed as security belonged to the 1st defendant and that a search was perfectly done which revealed as much. The 1st respondent defaulted on the loan repayment and thus the 1st respondent had a right to exercise its statutory powers of sale on a priority basis.

12. At this point, I am faced with two opposing interests. The Applicant claims the disputed land and argues that the first Respondent obtained it by deception before charging it. The other interest goes to the second respondent, who has a legitimate charge over it that was created by the 1st respondent. When weighing the interests of the two opposing parties, an injunction may not be pertinent to grant at this time; instead, a *status quo* order will be more suitable and proportionate given the current facts and circumstances.

13. The rationale for the grant of status quo order was discussed elaborately by Onguto J. in the case of *Thugi River Estate Limited & another v National Bank of Kenya Limited & 3 others* [2015] eKLR, as follows:

> "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. This is achieved through the issuance of formal prohibitory injunctive orders or through conservatory orders or stay orders. Such status quo orders do not extend to future circumstances however unlikely. "Status quo" in this respect, as maintained by an injunctive or conservatory or stay order, is the then-existing state of affairs. Often the order is very specific and descriptive in such instances and parties are expected, nay bound, to observe the order. The order will often be issued after a balance of all the

factors and circumstances. As was stated by Lord Diplock in *American Cynanid Co v Ethicon* [1975] 1 All ER 504 at 511

> " where factors appear to be evenly balanced, it is a counsel of prudence to take such measures as are calculated to preserve the *status quo*....."

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. 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.

It is certainly worth pointing out that as such status quo orders are prompted by the court to assist in case management, the court must always keep an eye on the fundamentals. Firstly, when it is of no assistance there is no need to invoke it. There must be gain in its imposition. It would therefore be important for the court to know and precisely describe the state of affairs being kept in situ.

Secondly, the court must ensure no conflict or combat is generated by the order for the maintenance of the status quo. Its effect is everything for the court. It should create no prejudice to one party, nor hardship to one party. There should be equality in the prejudice, some sort of rigid yet false equality. Both or all the parties should have a feel that neither is disadvantaged by the order. This once again calls for a clear description of the state of affairs being preserved or maintained. That way the court is also able to ascertain and balance the levels of prejudice or hardship if any.

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 directions *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 the status quo to be maintained until the 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 Mulberry 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."

14. At this point, the best course to take is to order for the preservation of the suit property and that the *status quo* be maintained that is the suit property to remain intact with no change in its proprietary ownership, the intended sale be held in abeyance until the current suit is heard and determined. Costs to the applicant in any event.

DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY IN OPEN COURT ON THIS 1ST DAY OF NOVEMBER 2023.

E. K. MAKORI

JUDGE