



Supplies and Services Limited & 2 others v Kenya Airports Authority (KAA) & 8 others; Kenya Airports Authority & another (Interested Parties) (Civil Suit E388, E405 & E410 of 2021 (Consolidated)) [2022] KEELC 3190 (KLR) (2 June 2022) (Ruling)

Neutral citation: [2022] KEELC 3190 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
CIVIL SUIT E388, E405 & E410 OF 2021 (CONSOLIDATED)**

MD MWANGI, J

JUNE 2, 2022

BETWEEN

SUPPLIES AND SERVICES LIMITED PLAINTIFF

AND

KENYA AIRPORTS AUTHORITY (KAA) 1ST DEFENDANT

THWAMA ENGINEERING SERVICES LTD 2ND DEFENDANT

CHIEF LAND REGISTRAR 3RD DEFENDANT

PUMWANI SERVICE STATION LIMITED 4TH DEFENDANT

AS CONSOLIDATED WITH

CIVIL SUIT E405 OF 2021

BETWEEN

PUMWANI SERVICE STATION LIMITED PLAINTIFF

AND

PAUL NJUGUNA MBURU 1ST DEFENDANT

SUPPLIES AND SERVICES LIMITED 2ND DEFENDANT

BERNARD NYAKUNDI MAKORI 3RD DEFENDANT

CHIEF LAND REGISTRAR 4TH DEFENDANT

AS CONSOLIDATED WITH

CIVIL SUIT E410 OF 2021



BETWEEN

TERRAZZO ENTERPRISES LIMITED PLAINTIFF

AND

PAUL NJUGUNA MBURU 1ST DEFENDANT

DIRECTOR OF SURVEY 2ND DEFENDANT

CHIEF LAND REGISTRAR 3RD DEFENDANT

AND

KENYA AIRPORTS AUTHORITY INTERESTED PARTY

THWAMA BUILDING SERVICES LTD INTERESTED PARTY

RULING

1. On 3rd February 2022, this court directed that all the Applications pending in all the 3 matters (now consolidated) be heard together and all at once and a ruling be rendered in respect of all those Applications. This was informed by the need to save on judicial time and clear the way for hearing and determination of the main suits.
2. That is how comes that this court finds itself in the unenviable position of having to determine five (5) applications at the same time. They were actually seven (7) but two (2) were withdrawn by the Applicants.
3. This case, probably more than any other epitomizes the ‘land question’ in this country. As the report of the Land Commission of Inquiry into the Illegal or Irregular Allocation of Land (2004) noted,

“The system of allocation of public land by the Commissioner of lands (then) characterized by the issuance of direct grants, subsequently facilitated massive illegal and irregular allocation of Government land by the Government of Kenya.”
4. One can only say that ‘the chicken have come home to roost’.
5. How else would one explain the conundrum before this court? Six (6) entities/individuals have all laid a claim of ownership over one parcel of land.
6. Or is it a fulfilment of the prophecy by Prophet Isaiah in the Bible, At Isaiah 4:1, when he prophesized that seven (7) women will take hold of one man and say, “We will eat our own food and provide our own clothes; only let us be called by your name.”
7. This case fits the bill for all intents and purposes to be termed as raising the matters of public importance and interest.

Summary of the Applications.

A. Applications by Terrazzo Enterprise Ltd.

8. Terrazzo Enterprises Ltd has filed 2 applications:-



- i. Application dated 30th November 2021.

The Applicant prays for an order of interlocutory injunction restraining the 1st Respondent (Paul Njuguna Mburu) and the interested parties - Kenya Airports Authority and Thwama Building Services Ltd, by themselves, their agents, servants and or personal representatives from fencing, excavation or construction on the suit property (unsurveyed commercial plot No. A – Nairobi) amongst other orders.

- ii. Application dated 6th January 2022

The Applicant prays that the court finds that the 1st and 2nd Interested parties - Kenya Airports Authority and Thwama Building Services Ltd, have willfully and knowingly violated the orders of the of the court issued on 15th December 2021. The Applicant too prays that the parties do pay Kshs.50,000/= for every day they have acted in contempt of the court orders.

B. Applications by Supplies and Services Ltd.

i. Application dated 31st December 2021

The Applicant prays that the court reviews its orders of 20th December 2021 dismissing its earlier application dated 15th November 2021 and in its place issue an order of temporary injunction restraining the 1st, 2nd and 4th Defendants from trespassing into, alienating, occupying, entering, constructing, fencing, subdividing, disposing, transferring, charging, selling, leasing out the suit property and the status quo ante the events of 11th November, 2021 preserved pending the hearing and determination of the suit.

In the alternative, the Plaintiff prays that the status quo ante the 11th November 2021, be preserved pending the hearing and determination of the suit, i.e. the Plaintiff/Applicant (Supplies & Services Ltd) do have the possession and exclusive occupation of the suit property.

ii. Application dated 17th January 2022.

The Applicant prays that the court discharges, vary and or set aside the interim orders of injunction issue on the 26th November 2021 and extended on 9th December 2021 in their entirety and that the Application dated 25th November 2021 be heard afresh, inter partes.

The Applicant prays that a temporary injunction do issue restraining the 1st Defendant (Pumwani Services Station Ltd) and the 5th Defendant (Kenya Airports Authority) from interfering or dealing with the suit property in any way.

iii. Application by Pumwani Service Station Ltd dated 25th November 2021.

The Applicant prays for an order of temporary injunction restraining the 1st Respondent (Paul Njuguna Mburu), the 2nd Respondent (Supplies and Services Ltd) and the 3rd Respondent (Bernard Nyakundi Makori) from interfering or dealing with the suit property. Secondly an order of permanent injunction restraining the 1st-3rd Defendants from interfering with the suit property and thirdly, an order of mandamus compelling the 4th Defendant (Chief Land Registrar) to issue a caution in favour of the Plaintiff/Applicant in respect of the suit property pending hearing and determination of the suit.

9. The Above applications fall into three (3) Categories, namely:-



- a. The Application for review;
- b. The Application for orders of interlocutory injunction, and
- c. The Application for contempt of court.

I propose to handle them in that order under the three (3) categories.

10. Considering the convoluted nature of this matter, I must be careful at this stage not to make any comments or findings or express opinions on the substantive issues in controversy to avoid hurting the trial. I am alive to the decision by Ringera J (as he then was) in the case of *Airland Tours and Travels Ltd vs National Industrial Credit Bank Nairobi* (Milimani) HCCC No. 1234 of 2002 where he stated that,

“.....in an interlocutory application the court is not required to make any conclusive or definitive findings of fact or law, most certainly not on the basis of contradictory affidavit evidence or disputed propositions of law.”

11. I will therefore be deliberately frugal with my words in this ruling.

Court's Directions

12. The Court's direction in this matter were that all the applications be dispensed with by way of written submissions. All the parties complied and in deed had the opportunity to highlight their submissions in open court on 24th March 2022.
13. The court has had the opportunity to read through the detailed submissions of the parties, together with the authorities cited in support of the parties' respective positions.
14. I must appreciate the parties in this matter for their extensive research, evidenced by the quality of their submissions.

Analysis and Determination

A. The Application for review.

15. This application is a Notice of Motion dated 31st December 2021 filed by Supplies and Services Ltd seeking to review the orders and ruling of this court delivered on 20th December 2021.
16. The Ruling of 20th December 2021 was in respect of the Application dated 15th November 2021 that sought an order of interlocutory injunction against Kenya Airports Authority and Thwama Engineering Services Ltd. The court's finding was that the application did not meet the threshold set in the case of *Giella vs Cassman Brown & Co. Ltd* (1973) EA 378 and the case of *Nguruman Ltd vs Jan Bonde Nielsen & 2 others* (2014) eKLR. The court therefore dismissed the Plaintiff's application with costs and directed that the matter proceeds to full hearing of the main suit forthwith. The Applicant has however come back seeking that the court reviews its orders.
17. The Applicant prays that the court reviews its earlier orders. The Applicant's basis for the application is the discovery of a 'new and important matter'. The Applicant avers that it was not aware that Pumwani Services Station Ltd had a claim over the suit property and was in fact the one who was developing the suit property. The Applicant alleges that the court had been informed that it was Kenya Airports Authority that was developing the land at that time.
18. The Applicant had therefore, after discovering the new and important matter gone ahead to amend its Plaint and joined Pumwani Services Ltd as a 4th Defendant and proceeded to file this Application.



19. The Application is opposed particularly by Kenya Airports Authority who argue that there is nothing new and important that the Applicant has discovered. They alleged that they had disclosed in their pleadings before the court about the existence of Pumwani Services Station Ltd; so the Applicant should not feign ignorance.
20. The substantive powers for review are provided for under Section 80 of the [Civil Procedure Act](#); while order 45 of the [Civil Procedure Rules](#) 2010, provide the procedural requirements. Section 80 of the [Civil Procedure](#) provides that:-
- “ Any person who considers himself aggrieved—
- a. by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
- b. by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”
21. Order 45 Rule 1(1) of the [Civil Procedure Rules](#) 2010, on the other hand is explicit that;
- (1) Any person considering himself aggrieved—
- a. by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
- b. by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.”
22. The Applicant herein alleges discovery of a new and important matter.
23. Order 45 Rule 1 is categorical that the ground of ‘discovery of new and important matter’ will only be allowable where the Applicant could not have known of such matter even after exercise of due diligence.
24. Kenya Airports Authority has countered the Applicant’s arguments with an averment that in their pleadings they had disclosed about Pumwani Service Station Ltd.
25. I have perused the responses by Kenya Airports Authority to the Applicant’s Application dated 15th November 2021. I agree with the submissions of KAA. Had the Applicant exercised due diligence, it would have known about Pumwani service station Ltd.
26. Accordingly, I find that the Applicant’s Application falls short of the requirements of order 45 Rule the [Civil Procedure Rules](#). It is hereby dismissed with costs.
27. I wish to further state that the Applicant has not laid down the basis for the grant of the alternative prayer seeking the restoration of the status quo as at 11th November 2021. Allowing the same as prayed would be tantamount to granting the Applicant a mandatory injunction. The court disallows the alternative prayer as well.



B. Applications for Interlocutory Injunctions pending the hearing and determination of the suits.

28. The Applications seeking orders of interlocutory injunction are three (3) in number:-
- a. Application dated 17th January 2022 by Supplies & Services Ltd.
 - b. Application dated 30th November 2021 by Terazzo Enterprises Ltd.
 - c. Application dated 25th November 2021 by Pumwani Services Station Ltd.
 - a) Application dated 17th January 2022 by Supplies and Services Ltd.
29. Before the three (3) cases were consolidated, this court had the occasion to consider an Application made by Supplies & Services Ltd, dated 15th November 2021. The Applicant herein is the same as in the earlier Application.
30. The court pronounced itself in the ruling dated 20th December 2021. The said ruling forms part of the records of the court.
31. The Application herein dated 17th January 2022 seeks similar orders as the earlier application against the 1st Defendant/Respondent (Pumwani Service Station Ltd) and the 5th Defendant/Respondent (Kenya Airports Authority).
32. The matter is clearly *res judicata* as against the 5th Defendant/ Respondent.
33. As against the 1st Defendant/Respondent, the court has perused the Application by the Applicant and is convinced that the Applicant relies on the same set of facts and grounds as in its application of 15th November 2021. The court therefore adopts its ruling of 20th December 2021 in ELC E388/2021 in respect of this application. The upshot is that this application is dismissed. The other prayers in the Application have been overtaken by events and the court need not say more.

B. Application dated 25th November 2021 by Pumwani Service Station Ltd.

34. The Applicant prays for a Temporary injunction, a Permanent injunction and an order for Mandamus, all in one. Off course an order for Permanent injunction and Mandamus cannot issue at this interim stage.
35. 'A permanent injunction is granted upon the hearing of the suit. It fully determines the rights of the parties before the court and is thus a decree of the court. The injunction is granted upon the merits of the case after evidence in support of and against the claim has been tendered.' (*Kenya Power & Lighting Company Ltd vs Sheriff Molana Habib* (2018) eKLR).
36. What the court shall only consider then is the prayer for a temporary injunction. The law is well settled on this issue. The triple requirements that the Applicant must establish to qualify for the grant of an order of temporary injunction were clearly spelt out in the case of *Giella vs Cassman Brown & Co. Ltd*. It has been restated and reaffirmed in many cases thereafter which parties have cited in their submission.
37. The Applicant's claim on the suit property is premised on a long term lease granted to them by Kenya Airports Authority (KAA) in exchange of a plot they allegedly owned but that they could not develop because it was within the 'flight funnel' of the 2nd runway at Jomo Kenyatta International Airport. Their right therefore flows from KAA. On the face of it, I am persuaded that they have a prima facie case.



38. The 2nd hurdle that an Applicant must surmount is that it must demonstrate that it stands to suffer irreparable injury unless the order of interlocutory injunction is granted. This irreparable injury as explained in the *Nguruman Ltd case (supra)* must be injury which cannot adequately be remedied by an award of damages in the absence of an injunction. The burden of proof is on the Applicant to prove the same.
39. As the court categorically stated in *Nguruman Ltd case*, this is a threshold requirement and the burden is on the Applicant to prove the nature and extent of the injury. The injury must be actual and substantial. ‘Speculative injury or mere apprehension will not do.’
40. I have keenly looked at the submissions by the Applicant. Nowhere has the Applicant submitted that he stands to suffer irreparable injury that cannot be compensated by an award of damages. The Applicant in my view has not surmounted this 2nd hurdle. Accordingly the Application fails on that basis and is hereby dismissed.

C. Application by Terazzo Enterprises Ltd dated 30th November 2021

41. The same reasoning applies to the Application dated 30th November 2021 by Terrazzo Ltd. In as much as the Applicant has established a *prima facie* case, it has not surmounted the 2nd hurdle. It has not demonstrated that it will suffer irreparable injury that cannot be compensated by an award of damages.
42. It is not enough for an Applicant to merely establish a *prima facie* case. That alone is not sufficient for the grant of an order of interlocutory injunction. The Applicant must proceed farther to satisfy the court that he is likely to suffer irreparable injury if the order of interlocutory injunction is not granted. That was the gist of the holding in *Nguruman Ltd case (supra)*. The court cited with approval the decision in *Kenya Commercial Finance Company Ltd vs Afraba Education Centre* (2001) Vol 1 EA 86, where the court had stated that:-

“If the Applicant establishes a *prima facie* case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the Respondent is capable of paying, no order of interlocutory injunction should normally be granted, however strong the Applicant’s claim may appear at that stage.”
43. The other prayers by the Applicant seeking reports from the 2nd & 3rd Respondents are premature. The Applicant should exhaust the discovery procedures under the [Civil Procedure Rules](#) before moving the court for the orders. The Application dated 30th November 2021 is dismissed.

Where does this leave the case?

44. I started by saying that this is not an ordinary suit. It raises momentous issues that can only be determined after a full hearing. That being the case, this court is of the view that the substratum of the suit, the suit property herein must be preserved pending the final determination of the issues herein.
45. Considering the claims by the parties expressed in their pleadings, this is an appropriate case where the court must resort to its inherent authority under sections 1, 1A, 3 & 3A of the [Civil Procedure Act](#), as well as article 159 of the [Constitution](#) in order to further the overriding objective, meet the ends of justice, to prevent prejudice to any party and to uphold the adjudicatory authority of this court.
46. Accordingly this court orders that the status quo be maintained pending the hearing and determination of this suit. The status quo is that Pumwani Service Station Ltd is in possession of the



suit property and shall remain in possession. However, Pumwani service station Ltd is prohibited from any acts of excavation, construction, building, developing or in any other way altering and dealing with the suit property pending the hearing and determination of the main suit, in the next six (6) months.

47. This suit shall be heard on a priority basis. It will be listed for mention before this court in 14 days for pre-trial directions and issuance of a hearing date thereafter. That is the only way that justice shall be served and done to all the parties.
48. I now proceed to the application for contempt.

Application dated 6th January 2022 by Terazzo Enterprises Ltd

49. The Applicant seeks for orders that;
- a. That the Court be pleased to find that the 1st and 2nd Interested Parties have willfully and knowingly violated the orders of this Honourable Court issued in the present suit on 15th December, 2021.
 - b. That the Court be pleased to sanction the 1st and 2nd Interested Parties to pay Kshs. 50,000/-, jointly and severally, for every day they have acted in contempt of the orders of the Court.
 - c. That costs for the application to be borne by the 1st and 2nd Interested Parties.
50. The Application is premised on the grounds on the face of it and Supported by the Affidavit of Gopal D. Patel deponed on the 6th January, 2022. The deponent avers that on the 30th December, 2021 status quo orders were issued by Wabwoto J. in the presence of Counsel for all parties.
51. The deponent further averred that despite the Respondents being aware of the orders, they continued to carry out construction on the suit premises. The Respondents' actions show a clear disregard of the orders of this court. He stated that the 2nd Interested Party was actually carrying out the construction on the suit premises as an agent of the 1st Interested Party therein. The Orders sought are to ensure that the sanctity of the court is upheld. The Applicant annexed undated photographs of the ongoing construction.
52. The Application was opposed by the Kenya Airports Authority through the Attorney General. The Attorney General filed grounds of opposition dated the 10th February, 2022 where he contended that the application violated all the principles of contempt proceedings since the alleged impugned order was not directed at the Kenya Airports Authority. Further that the Applicant had not complied with the procedural requirements hence the said orders should not be granted. Finally that there was no evidence of service of the said orders.
53. On the 15th December, 2021, the Learned Justice E. K. Wabwoto issued an order in respect of an application dated the 30th December, 2021. The order stated that:
- “That parties are hereby directed to maintain status quo and the matter be mentioned on 31st January, 2022.”
54. This is the order that the Applicant contends was violated by the Interested Party(s), its agents, servants or assigns when it continued fencing, excavation and construction on the suit premises after the order had been issued.
55. The *Black's Law Dictionary*, 8th Edition elaborates that 'Status quo' is a Latin word which means, 'the situation as it exists.' A status quo order's effect has been explained by Muriithi J in the case of Boabab



Beach Resort as quoted by F. Tuiyot J in Saifudeen Abdullahi & 4 others in Mombasa High Court Misc. Civil Cause no 11 of 2012, where he stated that;

“In my view, an order for 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.”

56. The order of the Court was clear and unambiguous. However, the applicant has not proved what the status quo was before the issuance of the orders and what the situation is after being disturbed by the alleged acts of the Respondents. That is how the Applicant would have established that the status quo was violated before proceeding to the second limb of proving who was responsible for the disturbance.

57. The standard of proof in contempt of court proceedings is higher than ‘the balance of probabilities’ as stated by the Court of Appeal in *Mutitika vs Baharini Farm Limited* [1985] KLR 229 . The court stated that:-

“In our view, the standard of proof in contempt proceedings must be higher than proof on the balance of probabilities, almost, but not exactly, beyond reasonable doubt.”

58. *Black’s Law Dictionary* (Tenth Edition) defines contempt of court as: -

“a disregard of, or disobedience to, the rules or orders of a legislative or judicial body, or an interruption of its proceedings by disorderly behaviour or insolent language, in its presence or so near thereto as to disturb the proceedings or to impair the respect due to such a body.”

59. Justice Mativo in the case of *North Tetu Farmers Co. Ltd vs Joseph Nderitu Wanjohi* (2016) eKLR restated the established principle of law as follows:-

“...there are essentially four elements that must be proved to make the case for civil contempt. The applicant must prove to the required standard (in civil contempt cases which is higher than civil cases) - (a) the terms of the order (or injunction or undertaking) were clear and unambiguous and were binding on the defendant; (b) the defendant had knowledge of or proper notice of the terms of the order; (c) the defendant has acted in breach of the terms of the order; and (d) the defendant’s conduct was deliberate.”

60. Although the Applicant has shown that the terms of the order were clear and that the 1st Interested Party had knowledge of the order having been served, the applicant failed to prove that applicant acted in breach of the terms of the order.

61. The Applicant during the highlighting of submissions stated that Thwama Building Services Ltd purged the contempt. From the affidavit evidence before the court, it is evident that Thwama Building Services Ltd were agents of KAA. If KAA was acting through the agent, how then can they be in contempt if their agent purged the contempt? Again, it is clear that it was Pumwani Service Station Ltd who were in possession of the suit property. They admitted that they were the ones who were constructing on the suit property.

62. Accordingly, the Application dated 6th January 2022 is dismissed for lack of merit.



Conclusion

63. From the foregoing, the Court makes the following orders:-

- a. That the Notice of Motion dated 31st December, 2021 is hereby dismissed with costs.
- b. That the Notice of Motion Application dated the 17th January, 2022 is hereby dismissed.
- c. That the Notice of Motion Application dated the 25th November, 2021 is hereby dismissed.
- d. That the Notice of Motion application dated 30th November, 2021.
- e. That the Notice of Motion Application dated 6th January, 2022 is hereby dismissed with costs.
- f. That the status quo be maintained pending the hearing and determination of this suit. The status quo is that Pumwani Service Station Ltd is in possession of the suit property and shall remain in possession. However, Pumwani service station Ltd is prohibited from any acts of excavation, construction, building, developing or in any other way altering and dealing with the suit property pending the hearing and determination of the main suit, in the next six (6) months.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 2ND DAY OF JUNE 2022.

M.D. MWANGI

JUDGE

In the Virtual Presence of:-

Mr. Ngunjiri h/b for Michuki for Terazzo Enterprises Ltd

Mr. Allan Kamau for KAA, Chief Land Registrar & Director of Surveys

Mr. Mango h/b for Katisya for Pumwani Service Station Ltd

Mr. Odunga for Paul Njuguna Mburu

Ms. Chelagat h/b for Arusei for Supplies & Services Ltd

Mr. Rotich for Bernard Nyakundi Makori

Court Assistant: Hilda

M.D. MWANGI

JUDGE

