



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC APPEAL NO. 31 OF 2020

FATUMA ABDI JILLO.....APPELLANT

VERSUS

KURO LENGESEN.....1ST RESPONDENT

COUNTY GOVERNMENT OF ISIOLO.....2ND RESPONDENT

JUDGMENT

(Being an appeal from the Ruling and Orders of Hon. E. Ngigi Principal Magistrate Meru in CMCC No. 4 of 2020 delivered on 15th June 2020)

Summary of facts

By a plaint dated 12th February 2020, the Plaintiff herein sued the 1st Defendant for trespassing on his property, being Plot No.119 Chechelesi and the 2nd Defendant for illegally reassigning the plot to the 2nd Defendant as Plot No.558. The Plaintiff states that he purchased an unregistered parcel of land in 1998 from one Lokuruka Etwe and presents an affidavit sworn by the said Lokuruka Etwe dated 25th March 1998, averring that he had transferred an unregistered parcel of land to the Plaintiff in consideration for Nine Thousand Shillings (Ksh. 9,000). The Plaintiff avers in his supporting affidavit that there were no advocates in Isiolo at the time and that the practice was to have the seller swear an affidavit of sale of land before the magistrate. The Plaintiff then states that on or about 2004 he excised one plot from his parcel of land and sold it to one Lawrence Nalawasi. He then procured a letter of Allotment in relation to the remaining portion of land, which now became identified as Plot 'B', identified on the ground by PDP No. ISL/117/98/303. The Plaintiff further states that he partitioned Plot 'B' and sold a portion of the same to another buyer, finally remaining with a portion registered by the County Council of Isiolo as Plot 119 Chechelesi. He further states that the person who had originally sold the land to him, the said Lokuruka Etwe, purported around the year 2015 to sell the Plaintiff's portion of land to the 1st Defendant. He states that the 1st Defendant used unlawful force, with the assistance of the 2nd Defendant to trespass onto the Plaintiff's land, to erect a timber house and even to connect electricity.

The 1st Defendant entered appearance and filed her replying affidavit on 21st February 2020. She avers that she is the owner of Plot No.558 Checheles having acquired the same through a sale agreement dated 15th December 2012, from one Lokuruka Etwe. She further avers that upon purchase of the said plot, she fenced it, built a timber house and has been in occupation since 2012. She rejects the Plaintiff's assertion that he has been in occupation of the Suit Property. That in 2013, she applied for formal registration of the parcel of land and a Part Development Plan Reference No. ISL/117/14/87 was issued to her. She avers that since then, she has been paying rates to the 2nd Defendant. That she first learnt of a dispute relating to her parcel of land in 2018 when the Plaintiff lodged a complaint with the County Government of Isiolo. That the dispute was referred to the National Land Commission's Dispute Resolution Committee. That in the course of determining the dispute, the Committee subjected the Letter of Allotment and PDP Reference presented by the Plaintiff for independent verification. That the documents were found not to be authentic. The 1st Defendant attaches letters from the National Director of Physical Planning referenced PPD/117/XIII/(29), dated 18th September 2019, which denied having any record of the Plaintiff's PDP and a second letter from the National Land Commission, referenced 31560/XVI/197 dated 4th October 2019, in which the Acting CEO confirms that the Plaintiff's letter of allotment and PDP did not originate from their office. That the NLC Committee conducted a site visit of the Suit Property and thereafter found the 1st Defendant was the rightful owner of the Parcel of Land, vide their ruling dated 20th January 2020. She disagrees with the Plaintiff's allegation that Plot No 119 is the same as her Plot 558 Chechelesi.

On 14th February 2020, the Plaintiff filed a Notice of Motion application seeking the following orders:

a. That the application be certified as urgent;

b. That an order of temporary injunction does issue restraining the Defendants whether by themselves, their respective servants or agents from entering, remaining on, developing or in any other way from interfering with the Plaintiff's enjoyment of Plot No.119 (otherwise designated as Plot No. 558) Chechelesi awaiting hearing and final determination of the suit;

c. That the 2nd Defendant, it's servants or agents be prohibited from processing or approving any document or transactions or from submitting any such documents for applications for survey, physical planning or issuing of Title Deed for the disputed property pending hearing and final determination of the main suit.

d. Such orders or directions as may be expedient and just.

The Plaintiff's Notice of Motion Application was contested by the Defendants and the matter canvassed by way of written submissions.

The court issued its ruling on the Plaintiff's Notice of Motion Application on 02nd June 2020. In issuing the said ruling, the court took note of the fact that the Plaintiff and the 1st Defendant make reference to two distinct land reference numbers, being Plot No. 119 Chechelesi and Plot 558 Chechelesi respectively. Further, both parties claim to be in occupation of the subject land. On the premises, the court found that it would be difficult to ascertain who between the Plaintiff and the 1st Defendant holds lawful documents merely from perusing the documents filed and decided that the best way to deal with the dispute is for the Court to conduct a site visit. As such, the court found that an injunction could not issue but noted the importance of having the land in question preserved from wastage or changes of ownership, likely to affect the outcome of the case. The court therefore made the following orders:

“Accordingly, the Court issues an order for status quo and which for the avoidance of doubt shall entail the following:

i. That there shall be no further constructions or development at the disputed parcel. Constructions which are ongoing to forthwith cease.

ii. There shall be no eviction of any party from the said parcel.

iii. There shall be no charging or transferring of proprietary interest of the land.

The said status quo to remain in force pending the hearing and determination of this suit. As regards costs, the same shall be in the cause.”

Aggrieved by the above ruling and orders issued by the trial court on 2nd June 2020, the 1st Defendant (now Appellant) filed her memorandum of appeal on 08th June 2020 in ELC Appeal 31 of 2020. She set out four grounds of appeal:

1. That the learned trial Magistrate erred in law and fact by issuing status quo orders in totally undeserving circumstances and thereby ended up allowing the 1st Respondent's application for injunction orders through the back doors (sic).

2. That the learned trial Magistrate erred in law and fact by issuing status quo orders as he did without the benefit of a surveyor's report or a scene visit report and thereby occasioned a miscarriage of justice by issuing unmerited orders.

3. That the decision and orders of the trial Magistrate were made under circumstances that point towards influence and impartiality on the part of the trial Magistrate in that:-

a. The court was purportedly moved to give directions on the 1st Respondent's application for injunction orders through an alleged letter that was never served upon the Appellant or its contents brought to the attention of the Appellant for rebuttal or otherwise;

b. The Court ordered that the ruling on the 1st Respondent's Application would be delivered on 4/6/2020 but proceeded to deliver the same on 3/6/2020 without notice of change of date or any explanation to the Appellant;

c. The Court in arriving at its decision adverted to matters that were not pleaded in the application under consideration.

4. That the ruling and orders made by the trial Magistrate are against the law and the evidence on record”.

Submissions

In line with the directions for the filing of submissions issued by the court on 31st August 2020, the Appellant filed her submissions on 14th September 2020. The submissions reiterated the contents of the memorandum of appeal. The case of *Giella Vs Cassman Brown [1973] E.A 358 and Joshua Walter Anyango T/A Anyango Ogutu & Co Advocates Vs Barclays Pension Services Limited & Another [2019] e K.L.Rwere* quoted in support of the position that the effect of a status quo order and an injunction are the same and that where the court found that an injunction order could not be issued, it ought not to have gone ahead and issued the status quo orders. The Appellant further submitted that the status quo orders ought only to have been issued after the site visit and further that none of the parties had requested for the orders granted.

Issues for Determination

The Appellant sets out four grounds of appeal, with a common thread running through them all, that is, that the trial court erred in issuing status quo orders in response to the 1st Respondent's Notice of Motion Application. The central issue for determination then is whether the trial court erred in issuing status quo orders.

Legal Analysis and Opinion

Before getting into the substance of the appeal, it is instructive to call to remembrance the duty to be borne by a court invited to consider a first appeal. In ***Selle Vs Associated Motor Boat Co. [1968] E.A 123***, the legal parameters and considerations for guiding a court of first appeal were set out as follows:

“The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, the court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.”

The Court of Appeal in ***Ephantus Mwangi and Another Vs Duncan Mwangi Civil Appeal No. 77 of 1982 [1982-1988] 1 KAR 278*** pronounced itself thus:

“A member of an appellate court is not bound to accept the learned Judge's findings of fact if it appears either that (a) he has clearly failed on some point to take account of particular circumstances or probabilities material to an estimate of the evidence, or (b) if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.

From the foregoing, the mandate of this court in the present instance is to evaluate the factual details of the case as presented in the trial court, to analyze them and to arrive upon its independent conclusion, but always bearing in mind that the trial court had the advantage of seeing and hearing the parties.

Now, to the substance of the appeal. From the issue framed for determination, this court is called upon to examine the anatomy of status quo orders, in a bid to evaluate whether or not the trial court erred, as is the Appellant's position in issuing the orders.

The Court has found various decisions engaged in the exercise of defining the contours of an order of status quo, when it ought to issue and the considerations that ought to guide the court in making the order.

First, *the 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 has been reiterated in a number of decisions:

In ***Republic Vs National Environment Tribunal, Ex-parte Palm Homes Limited & Another [2013] e KLR, 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...”*

In ***TSS Spinning & Weaving; Company Ltd Vs Nic Bank Limited & another [2020] e KLR***, the unpacked the purpose of a status quo order as follows:

“In essence therefore, a status quo order is meant to preserve the subject matter as it is/existed, as at the day of making the order. Status quo is about a court of law maintaining the situation or the subject matter of the dispute or the state of affairs as they existed before the mischief crept in, pending the determination of the issue in contention.”

In ***Kenya Airline Pilots Association (KALPA) Vs Co-operative Bank of Kenya Limited & another [2020] e KLR***, 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.”

Apart from preserving the substratum of the subject matter, the court has also found an order of status quo as a case management strategy, where the court is keen to prevent prejudice as between the parties to a matter pending the hearing and determination of the main suit.

Texaco Ltd Vs Mulberry Ltd [1972]1 WLR 814,

“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, 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.”

The Court of Appeal in the case of **Mugah Vs Kunga [1988] KLR 748**, upheld the practice of issuing status quo orders in land matters status.

“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.”

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.

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.”

The case of **Thugi River Estate Limited & another Vs National Bank of Kenya Limited & 3 others [2015] e K.L.R** notes that a status quo order can be given by the court exercising its general jurisdiction. Further that the order need not necessarily be prayed by the parties and infact can be originated by the court. The relevant portions of the judgement are underlined for emphasis:

“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.”

Of critical importance is the manner in which the cited case of **Thugi River Estate Limited & another Vs National Bank of Kenya Limited & 3 others [2015] e K.L.R** 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:

‘..... 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.’

From the above cases, the following matters relating to status quo orders are emergent:

First, that status quo orders can be made by the court on its own motion in exercise of its general jurisdiction. As such, the Appellant’s assertion that the orders have to be specifically prayed is incorrect. In any case, the last prayer in the 1st Respondent’s Notice of Motion application was for such orders as the court deemed just and fair. In the interest of balancing the scales of justice prior to the site visit, the trial court deemed it fair to grant status quo orders, which it is perfectly entitled of doing in exercise of its general discretionary powers.

Secondly, 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. The trial court made a finding that the Plaintiff and 1st Defendant both lay claim to a portion of land with two distinct plot numbers and both claim occupation. In its wisdom, the trial court decided that a site visit would shed light on whether the portion of land be the same one or different ones, in order to reach a just determination. The status quo orders were thus to freeze any activities that might imperil the final outcome of the case by preserving the subject matter as is, pending the hearing and final determination of the main suit.

Thirdly, 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. While appreciating the case quoted by the Appellant **Walter Anyango T/A Anyango Ogutu & Co Advocates Vs Barclays Pension Services Limited & Another [2019] e K.L.R** to the effect that status quo orders are tantamount to injunctions, it is clear that the circumstances in that case were of a special character so that the effect of an injunction and a status quo order, would have the same effect. Indeed, in the case of **Msa Misc Appln. (J.R) No. 26 of 2010. The Chairman Business Premises Tribunal at Mombasa Exparte Baobab Beach Resort (Mbsa) Ltd (UR)**, the court agreed that in certain circumstances, a prohibitory injunction may end up having the same effect as an order for status quo. This does not however mean that an injunction and a status quo order are one and the same thing, merely, that in certain circumstances, particularly where the order sought is one of a prohibitory injunction, it may happen that the effects of a that injunction and a status quo order may be similar. Since the court was dissatisfied that the Applicant (Plaintiff) had failed

to satisfy the conditions precedent to a grant of the injunctive orders sought, it was proper to deny those orders but instead to make an order for the preservation of status quo pending determination of the main suit.

Lastly, that decision in *Thugi River Estate Limited & another Vs National Bank of Kenya Limited & 3 others [2015] e K.L.R* requires a court originating status quo orders to explicitly frame the state of affairs to be preserved. It is the view of this court that the trial court fulfilled this mandate by framing the orders thus:

Accordingly, the Court issues an order for status quo and which for the avoidance of doubt shall entail the following:

i. That there shall be no further constructions or development at the disputed parcel. Constructions which are ongoing to forthwith cease.

ii. There shall be no eviction of any party from the said parcel.

iii. There shall be no charging or transferring of proprietary interest of the land.

The said status quo to remain in force pending the hearing and determination of this suit. As regards costs, the same shall be in the cause.

On the premises, I find this Appeal unmeritorious and the same is hereby dismissed with costs to the Respondent. It is so ordered.

DATED, DELIVERED Virtually and SIGNED at GARISSA this 28th day of July, 2021.

.....

E.C. CHERONO

ELC JUDGE

In the presence of:

- 1.M/s Masamba holding brief Kariuki for Appellant
2. Respondent/Advocate-Absent
3. Fardowsa- Court Assistant