



**In re Estate of Kailu Ng’oka (Deceased) (Succession Cause
518 of 2015) [2024] KEHC 7123 (KLR) (19 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 7123 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
SUCCESSION CAUSE 518 OF 2015**

**FR OLEL, J
JUNE 19, 2024**

BETWEEN

**SARAH MBWIKA 1ST OBJECTOR
ONESMUS KING’O MBWIKA 2ND OBJECTOR
PATRICIA MUMBUA MBWIKA 3RD OBJECTOR
GIDEON MBITHI MBWIKA 4TH OBJECTOR**

AND

**MUTUSE NG’OKA 1ST PETITIONER
NDETO KATHUKU 2ND PETITIONER
MASILA NG’OKA 3RD PETITIONER**

RULING

A. Introduction

1. Vide a Notice of Motion dated 30th March, 2023 brought under Section 5(1) of the *Judicature Act* Cap 8 Laws of Kenya, Order 40 Rule 3, Order 51 Rule 1 of the Civil Procedure rules and section 1A, 1B and 3A of the *Civil Procedure Act* and all the enabling provisions of law, the petitioners/Applicants sought for the following orders that;

1. Spent.
2. That the respondents, their agents and or servants be restrained by an order of temporary injunction from cultivating, cutting down trees or in any manner interfering with a parcel of land No. Machakos/Ulu/1086 pending hearing and determination.



3. That this honourable court cite Sarah Mbwika, Onesmus King’o Mbwika, Patricia Mumbua Mbwika and Gideon Mbithi Mbwika the respondents herein for contempt of court and detain them in prison for six months for being in contempt of this court’s status quo orders issued on 25.04.2022.
 4. That the respondents be ordered to pay the applicant kshs.150,000 or such other sums as the court may deem fit to purge their contempt.
 5. That the cost of this application be paid by the respondent.
2. The application was Supported by Supporting Affidavit dated 30th March 2023 sworn by Masila Ng’oka, who deposed that the respondents had filed an application seeking for revocation/annulment of grant issued to the Applicants, which was pending for hearing and on 25.4.2022, the court had issued an order that status quo to be maintained, which orders were served upon the respondents.
 3. It was deponed that in defiance of the said court orders, the respondents either by themselves their servants and/or agents had proceeded to cultivate, cutting down trees and had in several ways interfered with the parcel of land No. Machakos/Ulu/1086 (hereinafter referred to as the suit parcel) and that the respondent’s actions were in flagrant breach, disobedience and disregard of the court orders earlier issued.
 4. The petitioners/applicants further averred that court orders should not be issued in vain and had to be obeyed by all parties concern. It was therefore in the interest of justice that the court should cite the respondents for contempt and proceed to imprison them for a term not exceeding Six months or in the alternative the respondents be condemned to pay the Applicants Kshs.150,000/= or such other sums as the court may deem fit to purge the said contempt.

B. The Replying Affidavit

5. The respondents opposed this Application, through their Replying Affidavit dated 2nd May 2023, sworn by Onesmus King’o Mbwika , who deposed that the application was devoid of merit and should be dismissed with costs as the applicants had misinterpreted the orders of status quo as issued. The said orders had been issued in the context of their application dated 31st March 2022, where they had sought to revoke the confirmed grant issued herein and had further sought restraining orders as against the petitioners/applicants seeking to stop them from evicting them and interfering with their quiet possession of the suit parcel.
6. The Respondents averred that all along, they are the ones, who have been tilling and cultivating the suit parcel of land as at the time of approaching the court and the orders of status quo issued meant that they were to continue tilling and cultivating the suit parcel and not the reverse. The applicants had unlawfully and illegally tried to use Deputy County commissioner-Mukaa sub county to interfere with the status quo orders by evicting them, yet the said status quo orders never directed them to vacate off the suit land and thus were not in contempt of the said orders dated 25.04.2022. The respondents thus prayed that the said Application be dismissed.
7. The matter was canvassed by way of written submissions.



C. Submissions

(i) The Applicant's Submissions

8. The applicants filed their submissions dated 25th may 2023 and relied on section 5(1) of the Judicature Act in relation to contempt of court orders issued on 25.04.2022 and the case of Godfrey Kamau v Thomas Wambura (2012) eKLR, where it was held that due to the serious consequence and criminal nature of the penalty issued in the event of contempt of court, the same had to be proved beyond reasonable doubt. They had attached clear evidence of photographs, showing felling of trees, which act was in clear contempt of the status quo orders issued by the court. That the court orders are meant to be obeyed and no party should be tolerated by his court to obviate from the parameters of those orders. It was the Applicants contention that they had proved their case beyond reasonable doubt and urged the court to issue the orders sought.

(ii) The Respondent's Submissions

9. The respondents filed their written submissions dated 14th February,2024 and submitted that the issues arising for determination was whether the applicants had satisfied the requirements of Giella v Cassman Brown for granting temporary injunction, whether they were liable for contempt of court with regard to status quo orders issued and whether status quo orders differs from injunctive order. It was submitted that the applicants had misunderstood and/or deliberately misinterpreted the status quo orders earlier issued by Hon Justice G.V Odunga, as the said orders had been issued in the context of them not being evicted from the suit parcel pending hearing of their application seeking to revoke/annul the confirmed grant issued herein.
10. The applicants had not demonstrated to court how they would suffer irreparable loss should the orders sought not be granted and, in any case, the opposite was true as they were the ones in occupation of the suit parcel of land and would be more inconvenience if evicted before their claim could be heard on merit. The balance of connivance therefore necessitated that they continue to till and cultivate the suit parcel of land and allow that status quo to remain as earlier directed.
11. On whether the respondents are liable for contempt of court, it was reiterated that the orders of status quo earlier issued did not mean that they could not till or occupy the suit parcel. The context under which the said orders had been issued was to be considered as it was they who had sought to restrain the applicants from interfering with their quiet possession of the suit parcel. The status quo orders thus meant that they stay thereon until their application dated 31.03.2022 is heard.
12. Reliance was made to the case of Fatuma Abdi Jillov Kuro Lengesen & another [2021]e KLR, Republic v National Environmental Tribunal, ex parte Palm Homes & another [2013] eKLR, TSS Spinning & Weaving Company Ltd v NIC Bank Limited & another [2020]eKLR, Kenya Airline Pilots Association (KALPA) v Co-operative Bank of Kenya Limited & another [2020] eKLR Texaco Ltd v Mulberry Ltd [1972]1 WLR 814, Mugah v Kunga [1988] KLR, where the various courts had explained the purpose of status quo orders and by and large it meant that circumstances as at the time when the order is made must be maintained/preserved.
13. On whether a status quo order differs from an injunctive order, reliance was made to the case of Boabah Beach Resort as quoted by F. Tuiyot (J) in Saifudeen Abdullahi & 4 Others, Mombasa High court Misc. Civil cause No 11 of 2012, where it was explained that status quo was 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. An order for status quo merely leaves the situation or things as they stand pending the hearing of the reference or complaint.

14. It was finally submitted by the respondents that they had not disobey the status quo orders as they had not made any further developments on the suit land parcel, had not evicted any party, had not charged or interfered with the proprietary interest in the said suit parcel nor had they not cut down trees or interfered in any manner contrary to the status quo orders as issued. The orders of injunction and contempt as sought were therefore irrelevant and they prayed that the said application be dismissed.

D. Analysis & Determination

15. I have considered the application, affidavits in support and in opposition to, submissions and the authorities relied upon. The issue that arises for determination is whether the applicants have met the threshold to warrant grant of injunctive orders and whether the respondents are in contempt of court orders issued on 25/4/2022.
16. The principles of injunction was enunciated in the case of *Giella v Cassman Brown* (1973) EA 358 and as was reiterated in the case of *Nguruman Limited versus Jan Bonde Nielsen & 2 others* CA No.77 of 2012 (2014)eKLR where the Court of Appeal held that;

“in an interlocutory injunction application, the applicant has to satisfy the triple requirements to a, establishes his case only at a prima facie level, b, demonstrates 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.

These are the three pillars on which rests the foundation of any order of injunction interlocutory or permanent. It is established that all the above three conditions and states are to be applied as separate distinct and logical hurdles which the applicant is expected to surmount sequentially”

17. Further in the case of *Mrao Ltd Versus First American Bank Of Kenya Ltd* (2003) Eklr the said court defined on a prima facie case as ;

“... 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 legal right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

18. The Applicants deponed that in defiance of the court orders, the respondents either by themselves their servants and or agents proceeded to cultivate, cutting down trees and interfering with the suit parcel, which has been denied by the respondents who averred that they have status quo orders issued in their favour and had not breached the same. In this case, the applicants have not demonstrated that they have prima facie case since the context upon which the status quo orders were issued meant that, the respondents continue to being in occupation of the suit parcel on land. Further the photo annexed of land being cultivated cannot be admitted in evidence in absence of compliance with provisions of Section 106B of the *Evidence Act*.

19. On the second limb, in case of *Pius Kipchirchir Kogo versus Frank Kimeli Tenai* (2018) Eklr the court stated;

“irreparable injury means that the injury must be one that cannot be adequately compensated for in damages and that the existence of a prima facie case is not itself sufficient. The applicant should further show that irreparable injury will occur to him if the injunction is



not granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury.

20. The court is inclined to agree with the respondents submissions that since they were in occupation of the land, they would suffer irreparable loss if the status quo is not maintained. The applicant have also not shown how cultivation of the said suit parcel will harm their interest or breach any of their rights and in any event, if found otherwise eventually, the loss suffered can be measured and adequately compensated.
21. Similarly the said case of *Pius Kipchirchir Kogo versus Frank Kimeli Tenai* (2018) EKLK, the court defined the concept of balance of convenience as :

' The meaning of balance of convenience will favor of the plaintiff' is that if an injunction is not granted and the Suit is ultimately decided in favour of the plaintiffs, the inconvenience caused to the plaintiff would be greater than that which would be caused to the defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience it is really the balance of inconvenience and it is for the plaintiff's' to show that the inconvenience caused to them be greater than that which ma)' be caused to the defendant's inconvenience be equal, it is the plaintiff who suffer.

In other words, the plaintiff have to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater which is likely to arise from granting”

22. The respondents had by their earlier application dated 31.03.2022, sought injunctive orders pursuant to which status quo orders were issued. The balance of convenience tilts in favour of sustaining the said status quo orders earlier issued and further no special circumstances have been presented to warrant interference with the same and issuance of orders in favour of the applicants herein.
23. The applicants had also sought to have the respondents committed to civil jail for being in contempt of the earlier status quo orders issued on 25.04.2024. In order to find a person guilty of contempt there must be proof of willful and intentional disobedience of a court order. In *Mahinderjit Singh Bitta – v Union of india & others* n0 100 of 2010 the Supreme Court of India stated as follows: -

“In exercise of its contempt jurisdiction the courts are primarily concerned with enquiring whether the contemnor is guilty of intentional and willful violation of the order of the court, even to constitute a civil contempt. Every party before the court and even otherwise, is expected to obey the orders of the court in its spirit and substance. Every person is required to respect and obey the orders of the court with due dignity for the institution (own emphasis)

24. In case of *Econet wireless kenya limited v Minister for information and communication of kenya authority* [2005] eKLR Hon Justice Ibrahim (as he then was) stated as follows: -

“It is essential for the maintenance of the rule of law and order that the authority and the dignity of our courts are upheld at all times. The Court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors. It is the plain and unqualified obligation of every person against whom an order is made by court of competent jurisdiction, to obey it unless and until the order is discharged. The uncompromising nature of this obligation is shown by the fact that it



extends even to cases where the person affected by the order believes it to be irregular or void. (emphasis)

25. In *Gatharia K. Mutikika – v Babarini Farm Ltd* [1985] KLR 227 it was held that-

“A contempt of court is an offence of a criminal character. A man may be sent to prison. It must be proved satisfactorily..... it must be higher than proof on a balance of probabilities, almost but not exactly, beyond reasonable doubt. The standard of proof beyond reasonable doubt ought to be left where it belongs, to wit criminal cases. It is not safe to extend it to offences which can be said to be quasi-criminal in nature.

However, the guilt has to be proved with such strictness of proof as is consistent with the gravity of the charge... Recourse ought not to be heard to process contempt of court in aid of a civil remedy where there is any other method of doing justice. The jurisdiction of committing for contempt being practically arbitrary and unlimited, should be most jealously and carefully watched and exercised with the greatest reluctance and the greatest anxiety on the part of the judge to see whether there is no other mode which is not open to the objection of arbitrariness and which can be brought to bear upon the subject..... applying the test that the standard of proof should be consistent with the gravity of the alleged contempt... it is competent for the court where contempt is alleged to or has been committed, and or an application to commit, to take the lenient course of granting an injunction instead of making an order for committal or sequestration, whether the offender is a party to the proceedings or not.” (own emphasis)

26. Similarly In *Oilfield Movers ltd – v – Zabara oil & gas limited* [2020]eKLR the court stated -

“It is important however that the court satisfies itself beyond any shadow of a doubt that the person alleged to be in contempt committed the act complained of with full knowledge or motive of the existence of the order of the court forbidding it. The threshold is quite high as it involves possible deprivation of a person’s liberty.....”

27. In this case, there is obviously a discord and thus misinterpretation of the status quo orders. The respondents averred that they are not in contempt of court as the orders did not mean they should not continue occupying and tilling the suit parcel as they were occupying and cultivating the same when the orders were issued and in fact it was the applicants who have been unlawfully and illegally trying to use the Deputy County Commissioner Mukaa Subcounty to interfere with the status quo orders issued by evicting them.

28. I find that there is no willful disobedience of the court order issues on 25.04.2022. The status quo orders did not mean that the respondents could not cultivate the suit parcel where they were residing, before the said orders were issued. It only meant that they could interfere with the proprietary interest thereon, not to carry out developments and were also not to be evicted from the said parcel, given the context of the orders sought in the chamber summons application dated 31st March 2022.

E. Disposition

29. The upshot is that the petitioners/Applicant’s application dated 30th March 2023, is not merited and the same is dismissed with costs to the objectors / respondents.

30. It is so ordered.

RULING WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 19TH DAY OF JUNE, 2024.



FRANCIS RAYOLA OLEL

JUDGE

DELIVERED ON THE VIRTUAL PLATFORM, TEAMS THIS 19TH DAY OF JUNE, 2024.

In the presence of;

Ms Musau for Applicants

No appearance for Respondents

Sam Court Assistant

