



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

HCCC NO. E397 OF 2018

MASTER POWER SYSTEMS LIMITED.....PLAINTIFF/APPLICANT

VERSUS

CIVICON ENGINEERING AFRICA.....1ST DEFENDANT/RESPONDENT

GZI KENYA LIMITED.....2ND DEFENDANT/RESPONDENT

RULING

BACKGROUND

1. The 1st defendant filed an application dated 29th September 2020 seeking the following orders: -

1. Spent

2. This court be pleased to defer its ruling on the plaintiff's application dated 14th September, 2020, which ruling is scheduled to be delivered on 1st October 2020, pending the hearing and determination of the instant application.

3. Pending the inter partes hearing and determination of this application, an order of stay be and is hereby issued, staying the execution of the order entered against the Applicant/1st Defendant on 19th June 2020.

4. The order entered on 19th June 2020 against the 1st defendant be and is hereby set aside.

5. The 1st defendant be and is hereby granted leave to defend the Plaintiff's Applications dated 5th December 2018 and 4th February 2019 the said applications to proceed and be heard denovo.

6. This court be pleased to order that the applicant be served with both applications where after the applicant shall file its replying affidavit within the timeline that this court deems fit.

7. The costs of this application be provided for.

2. When the application came up for mention on 1st October 2020, this court directed the parties to file and exchange pleadings and to canvass the application by way of written submissions.

3. The matter was then listed for mention on 28th October 2020 to confirm compliance. Before the ink could dry on the directions of 1st October 2020, the plaintiff filed an application dated 16th October 2020 seeking inter alia, orders to restrain the 2nd defendant from entering upon, taking over, excavating, damaging, constructing on, developing, marketing, offering for sale, selling, transferring, charging or interfering with Land Title Number Kajiado/Kaputei South/3875 pending the inter partes hearing of yet another application dated 30th July 2020 wherein the plaintiff mainly seeks similar orders to restrain the 2nd defendant from dealing in any manner whatsoever with the suit property among other prayers.

4. When the application dated 16th October 2020 came up for directions on 22nd October 2020, **Mr. Githui**, learned counsel for the plaintiff sought the interim orders of injunction pending the determination of the said application and the earlier application dated 30th July 2020 on the basis that the 2nd defendant had already advertised the suit property in question for sale.

5. The court then directed that the matter be mentioned on 28th October 2020 as earlier scheduled and ordered that the status quo obtaining in the suit property be maintained thus triggering filing of the application dated 23rd October 2020 which is the subject of this ruling. In the said application, the 2nd applicant seeks orders to set aside the status quo orders issued on 22nd October 2020.

6. The application is premised on the grounds that: -

a) On 19th October, 2020 the plaintiff filed a Notice of Motion Application seeking injunctive relief (“the 4th injunction Application”) in respect of the 2nd defendant’s property and the same was slated to come up for mention of directions on 22nd October, 2020 before this honourable court.

b) On the aforesaid date the matter was not listed on the court’s daily cause list, however, out of an abundance caution, the 1st defendant’s advocate attempted to log in to the virtual court session via the Microsoft Teams Platform.

c) Due to an unforeseeable failure of technology on the part of the 1st defendant’s advocate, he was unable to join the online court session and the court proceeded to issue a status quo order at the urging of the plaintiff’s advocate and without the benefit of hearing arguments from the 2nd defendant’s advocates against issuance of the same.

d) The injunction application was made on the foot of material non-disclosure, to wit that the plaintiff had filed an earlier injunction application dated 10th December 2018 in which it had sought identical injunctive relief in respect of the 2nd defendant’s property and the same had not been granted in a ruling delivered on 23rd April, 2020 by this Honourable court. For all intents and purposes, the 4th injunction application is res judicata.

7. The plaintiff opposed the application through the replying affidavit of **Mr. Keval Lalji Bhanderi** who states that the application is mischievous and does not meet the threshold set for the granting of setting aside orders. He further states that the status quo orders should subsist as it does not prejudice the applicant in any way but only serves as a case management strategy to safeguard the plaintiff’s claim.

8. Parties canvassed the application by way of written submissions, which I have considered. The main issue for determination is whether this court should set aside the status quo order issued on 22nd October 2020.

9. Before I consider the merits of the application dated 23rd October 2020, I wish to point out that this court is appalled at the high turnover of applications that the parties herein have filed in this matter. It would appear that the parties herein are out to outdo each other in the race of filing applications one after the other. I say so because looking at the background outlined herein above the plaintiff filed two applications dated 30th July 2020 and 16th October 2020 seeking similar injunctive orders even though the 1st defendant’s application dated 29th September 2020 was still pending. The three pending applications have apparently quite surprisingly been overtaken by the current application that seeks to set aside status quo orders.

10. Be that as it may, the court will go ahead and determine the merits of the setting aside application.

11. **Mr. Darr**, learned counsel for the 2nd defendant submitted that the status quo orders ought to be set aside as they were issued in their absence owing to their inability to log into the court’s online session of 22nd October 2020 as the matter was not cause listed. Counsel argued that the plaintiff therefore stole the match from them by asking for the status quo orders in their absence.

12. Counsel urged the court to invoke the overriding objective principle under Section 1A and B of the Civil Procedure Act and to set aside orders issued in the absence of counsel where the case was not cause listed. Counsel cited the decision in **Anthony Milimu Lubulellah Advocates v Patrick Mukiri Kabundu & 3 Others** [2019] eKLR where the Court of Appeal cited, with approval, the decision in **Rahab Wanjiku v Esso Kenya Limited** [1995-1998] EA 332 wherein it was held: -

“We have no doubt that where a matter is fixed for mention, as it was in this case, the learned judge had no business determining on the date, the substantive issues in the matter. He can only do so, which was not the case here, if the parties so agree and of course, after having complied with the elementary procedure of hearing what submissions counsel may wish to make on behalf of the parties, which he did not do and moreover, gave no good reasons for adopting such a procedure which is repugnant to the administration of justice.”

13. Counsel added that the plaintiff is guilty of material non-disclosure as similar prayers had earlier been rejected on 22nd June 2020. It was further submitted that the dispute between the parties has nothing to do with the suit property as the property is not the subject of the prayers sought in the plaint.

14. On his part, **Mr. Githui** for the plaintiff submitted that the doctrine of res judicata is not applicable to the present application and that all the material disclosure was made in the application dated 30th July 2020.

15. Counsel submitted that the court’s jurisdiction in granting status quo orders is wide and that the **Anthony Lubulellah** case (supra) is distinguishable from the present case in view of the fact that substantive orders were issued in the said case. It was submitted that status quo orders are issued as a case management tool pending the substantive determination of the case.

16. Onguto J. discussed the issue of circumstances when status quo orders should be issued/vacated in **Thugi River Estate Limited & Another v National Bank of Kenya Limited & 3 Others** [2015] eKLR as follows: -

“As I understand it, orders for status quo preservation are issued by the court in one of two forms.

*Firstly, an order of status quo will issue through a judicial process. Where the court in exercise of its general and statutory jurisdiction grants orders or 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 should 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 Cyanide 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 of 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 to be preserved until a particular occurrence or until the court’s further order. 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 that parties to it, it is more appropriate and exceedingly relevant to describe clearly the state of affairs at the time the order of status quo is issued.

The court must also ensure that no conflict or combat is generated by the order for maintenance of 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.”

17. In the present case, this court, upon considering the plea by the plaintiff’s counsel that the subject suit property was in danger of being sold, following its advertisement, ordered that the status quo then obtaining in the suit property be maintained pending the hearing of the substantive applications. This means that the status quo order was merely a stop-gap measure or a case management tool to preserve the subject matter of the applications so as to allow the court consider the merits of the applications.

18. Under the above circumstances and considering that the status quo orders fall under the discretionary orders of the court, I find that setting them aside at this stage, before hearing the merits of the applications, will be akin to this court sitting on appeal in its own decision.

19. I am therefore not persuaded that the application dated 23rd October 2020 is merited and I therefore dismiss it with no orders as to costs.

20. Considering my sentiments regarding the multiple pending applications, I am of the humble view that the parties should focus on prosecuting the substantive applications that would have the effect of determining whether or not the plaintiff is entitled to orders of injunction.

Dated, signed and delivered via Microsoft Teams at Nairobi this 15th day of April 2021 in view of the declaration of measures restricting court operations due to Covid -19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on the 16th April 2020.

W. A. OKWANY

JUDGE

In the presence of:

Mr. Githui for Lusi for plaintiff/respondent.

Mr. Mbaluto for 2nd defendant.

Mr. Mwangi for Miss Kitoo for 1st defendant.

Court Assistant: Sylvia.