



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT MIGORI

ELC CASE NO. 133 OF 2018 (O.S)

IN THE MATTER OF LIMITATION OF ACTIONS ACT CAP 22 LAWS OF KENYA

AND

IN THE MATTER OF CLAIM FOR ADVERSE POSSESSION PURSUANT TO SECTION 38 OF LIMITATION OF ACTIONS ACT

AND

IN THE MATTER OF LR NO. NORTH SAKWA/KANYAMGONY/1098

BETWEEN

HERMAN ORWA ANYANGO.....PLAINTIFF/RESPONDENT

VERSUS

JOSEPH NDUAT ANGAGA.....DEFENDANT/APPLICANT

RULING

1. By a notice of motion dated 30th September 2019 and filed in court on 1st October 2019 brought under Order 40 Rule 7 and Order 50 Rule 15 of the Civil Procedure Rules, 2010 and sections 1A, 1B and 3A of the Civil Procedure Act Chapter 21 Laws of Kenya (the application herein). The defendant herein Joseph Nduat Anganga,(the applicant herein) through learned counsel, Mr. Sam Onyango, has sought the following orders;-

a) Spent

b) **THAT** pending the hearing and determination of this application inter partes this court may be pleased to grant an order of interim stay of execution and/or implementation of its orders made on the 17th day of September 2019.

c) **THAT** the honourable court may be pleased to discharge, set aside and/or vary its orders made on the 17th day of September 2019.

d) **THAT** this court may be pleased to set down the plaintiff's application dated 25th March 2019 for inter partes hearing.

e) **THAT** in the alternative to prayer No. (4) above this honourable court be pleased to issue orders for the maintenance of status quo prevailing as at the time of filling of the said application pending final disposal of the suit.

2. The application is premised on grounds (i) to (xi) set out on its face which include that the orders of this court issued on 17th September 2017 were principally made ex-parte and that the plaintiff (respondent) has breached the terms of the said order and generally abused the same. The application is further based upon the applicant's supporting affidavit of 25 paragraphs sworn on 30th September 2019 and documents marked as "**JNA 1**" to "**JNA 6**" annexed to the affidavit which include a copy of title deed (JNA 1), a copy of extracted order (**JNA3**) and photographs of the applicant's semi-permanent structures (**JNA4**) and photographs of the destroyed crops (**JNA 6 a and b**).

3. Briefly, the applicant complains that he is the registered proprietor of the suit land, LR NO. NORTH SAKWA/KANYAMGONY/1098 and that on 17th September 2019, the court issued injunctive orders against him as shown in document marked as "JNA 3". That since 18th September 2019, the respondent has forcibly allowed his livestock to invade and graze on the applicant's crops growing on the suit land as revealed in the photographs (JNA 6 (a) and (b)). That the applicant did delay in filing a replying affidavit to the respondent's application

dated 23rd March 2019 solely due to the mistake of counsel hence the application was heard ex-parte. That the prayers sought in the application be granted in the interest of justice.

4. In his 12-paragraphed replying affidavit sworn 22nd October 2019 and filed in court on the even date, the respondent namely Herman Orwa Anyango through learned counsel, Mr. Brian Mboya opposed the application, termed it unmerited and sought dismissal of the same with costs to the respondent. The respondent deposed inter alia, that he has obeyed the temporary injunctive order and more importantly, an order of status quo issued by this court on 17th September 2019.

5. The respondent further deposed that it is the applicant who has disobeyed the court's order as he has fenced off the suit land, North Sakwa/Kanyamgony/1098 with iron sheets, started mining gold thereon and intends to dispose of the suit land. That the impugned orders were not issued ex parte as learned counsel, Mr. Agure Odera held brief for the applicant's counsel when the status quo orders were made by this court.

6. On 16th December 2019, counsel for the respective parties informed this court that they did not intend to file and serve submissions regarding the application. Accordingly, the court noted the same and fixed this ruling date in respect of the application.

7. I have duly considered the application, the replying affidavit and proceedings of 17th September 2019 and 16th December 2019. So, is the instant application merited for the grant of the orders sought therein?

8. The legal provisions under which the application was initiated, are considered. The orders sought in the application relate to this court's orders made and issued on 17th September 2019 and marked as "JNA3" annexed to the instant application.

9. The impugned orders were propelled by the respondent's application by way of a Notice of motion dated 25th March 2019 seeking inter alia, a temporary injunction and an inhibition order pending the hearing and determination of the instant suit. On 16th July 2019, the applicant herein in person sought time to file and serve a reply to the said application and his plea was granted accordingly.

10. During inter partes hearing of the application on 17th September 2019, the court termed the application unopposed as the applicant had not filed and served any reply thereto within 14 days as ordered on 16th July, 2019. Thus, the application was allowed in terms of orders 3 and 4 sought therein.

11. Moreover, following a request made by learned counsel, Mr. Agure Odera who was holding brief for Mr. Sam Onyango learned counsel for the applicant, this court restated orders 3 and 4 sought and granted in the application and further ordered inter alia, that :-

a) THAT parties to respect and maintain their respective portions and not to be evicted or uprooted therefrom pending the hearing and determination of the suit in accordance with section 13 (7) of the Environment and Land Court Act, 2015 (2011).

12. The orders granted on 17th September 2019 were in the nature of status quo to preserve the suit land pending the outcome of the instant suit; see **Ogada –vs- Mollin (2009) KLR 620**.

13. Additionally, the orders were granted in the presence of both parties during inter partes hearing as provided for under Practice Direction number 32 of the Environment and Land Court Practice Directions, 2014; see also **Musa Angira Angira –vs- ICDC (2015) eKLR** which I hereby approve accordingly.

14. It is abundantly clear that the applicant has sought orders including status quo orders in the application. Order number 5 sought therein tell it all. The status quo orders were granted as already noted at paragraph 11 hereinabove.

15. It therefore follows that the applicant was aware of the orders sought hereinabove. The said orders were granted during inter partes hearing of the application whereby the applicant in person and his counsel fully participated in the proceedings. The orders were not made ex-parte and the same are also sought in the instant application. The best the court can do is to extend the interim orders in the obtaining scenario.

16. In the upshot, I find the application dated 3rd September 2019 and filed in court on 1st October 2019, devoid of merit. I proceed to dismiss the same with costs in the cause.

DATED, SIGNED and DELIVERED at MIGORI this 12th day of FEBRUARY 2020.

G.M.A. ONGONDO

JUDGE

In the presence of :-

Mr. Sam Onyango learned counsel for the applicant defendant

Mr. O.M. Otieno holding brief for Mr. Kwanga Mboya learned counsel for the respondent

