



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT ELDORET**

**PROBATE & ADMINISTRATION CASE NO. 19 OF 2012**

**ESTATE OF MALAKWEN ARAP CHERUIYOT**

**TECLA JEPKIRUI.....1<sup>ST</sup> PETITIONER**

**WILSON K. TUWEI.....2<sup>ND</sup> PETITIONER**

**VERSUS**

**JOSEPH KIPOP TUWEIY.....OBJECTOR**

**RULING**

1. There are two applications in this matter, which were directed to be heard simultaneously one is dated 3<sup>rd</sup> June 2019 along with the Supporting Affidavit seeks that the Objector/Respondent **JOSEPH KIPOP TUWEI** be ordered to attend court in person at the hearing of the application together with the area chief **SAMUEL KIPSONGOK MARITIM**.

b)That conservatory orders do issue preserving both standing and felled trees on the disputed land parcel known as **MOI'S BRIDGE/SIRIKWA BLOCK 3 (ZIWA) 325** pending the conclusion of this succession cause.

c)That the objector be committed and/or detained in prison for disobedience and/or breach of orders issued by the court on 08.05.2019.

d)That an order issued for the property of the objector to be attached for such period as the court may deem fit, on account of disobedience of the aforementioned court order.

e) Costs of this application be provided for.

2. The grounds on which this application is premised is that on 8<sup>th</sup> May 2019, this court ordered that the status quo be maintained upheld/preserved and/or retained pending the hearing and determination of this suit.

Apparently, the objector's son, **SILAS ROP** has been residing in, utilizing, developing, investing and/or using for subsistence the suit property for 7 (seven) years, while the objector has been in possession and use for 19 (nineteen) years. i.e since the year 2001 to date.

3. The objector has since planted blue gum trees on the suit property occupying 5 (five) acres from the year 2005 and 2006, and maize for the season 2019 and grazing animals. The blue gum trees have since matured and are ready for harvesting, maize has been planted and is growing, while animal graze and generally the land is utilized.

4. The objector has since harvested almost 375 blue gum trees worth Ksh.300,000/- in 2018, for his personal use and commercial purposes – this happened again on 27.5.2019, 28.05.2019 and 29.05.2019 where 300 trees were felled for commercial purposes. On 30.05.2019, the applicant used police officers from **ZIWA SIRIKWA** police station to intimidate and confiscate the objector's properties being a power saw machine without any valid court order on the strength of a report to police. Respondents are accused of interfering, with the status quo and the applicant/objector is apprehensive that unless this court interprets the meaning of the order which maintained the status quo in context/perspective then the petitioners will and intend to violate the meaning of that order.

5. The objector points out that the trees were felled for commercial purposes and payments had been made to the purchasers, who have now threatened to rescind the purchase contract – to the detriment of the objector.

6. The petitioners vide a replying affidavit sworn by **WILSON TUWEI**, maintain that the court ordered for maintenance of existing status quo, laying emphasis of the words

**“EXISTING STATUS QUO BE MAINTAINED.”**

and argues that best understanding of those words meant that the position prevailing as at the date the order was given i.e the trees were standing and none had been felled is what was to be maintained.

7. That even at the time the order was made, the petitioners had requested their counsel to seek an order to preserve the trees as the objector had stated that he would return the land to them.

It is their argument that their interpretation of the order means

- i. The objector would continue using the land as he had done before pending conclusion of the objection proceedings
- ii. The objector would continue being in occupation but was not to fell any trees or use the land in an adverse manner which would be detrimental to the estate.

8. That since the objector was no longer motivated to proceed with the objection proceedings he had filed, the petitioner orally asked the court to protect the suit property, particularly the trees. This request was informed by their apprehension that the objector would cut down the trees in anger over their claim that he returns the land.

9. The petitioners fault the objector saying he has failed to explain why application to cut down the trees was made by **ABRAHAM KIPTANUI SIRMA**, and the objector is said to be trying to hide behind third parties. The latter obtained an order from an area Chief **JONAH RUTO**. The petitioners deny interfering with the status quo on the land saying the objector confirms that the power saw was confiscated by police after he reported the objector's actions to police. Further the request to court had been for preservation of the trees not to prevent farming activities of maize and grazing animals.

10. The petitioners argue that the felled trees were not ready for harvest pointing out that even the application was restricted to stunted and drying up trees, yet the objector felled all the trees on one portion of the farm. It is also emphasized that what happened in the year 2018 is not in issue but what transpired after the order of 8.05.2019 was issued. The area Chief **SAMUEL KIPSONGOK MARITIM** who was aware of the order was present and should shoulder some blame.

11. So why the obsession with trees which they did not plant? The answer is at para 25 of the 2<sup>nd</sup> petitioner's replying affidavit that

**“We have not reached the stage where we will require the Objector/Applicant together with his family, servants and agents to leave the land, but what we want is that the trees be preserved to compensate the Estate of the deceased caused by the devaluation and depletion of the health of arable land caused by the blue gum trees.”**

12. In response to the application by a replying affidavit the Objector/Respondent states that his understanding of the order for status quo was to continue occupying, utilizing and being in possession of the land. That since he has developed, planted, harvested, earned, utilized and used the blue gum trees over the years for commercial understood the order to mean “carry on as usual”, and that it is the petitioners who have violated the order by using police to confiscate his power saw.

13. In reaction to the petitioner's application, the Respondent/Objector filed an application dated 4<sup>th</sup> June 2019 asking the court to interpret the meaning of the order for maintaining of status quo, which really is a replica of what is deposed in the replying affidavit by the Respondent. Alongside that, the applicant prays for orders to restrain the **OCS ZIWA SIRIKWA** police station from interfering with the status quo in the absence of an otherwise valid court order.

Let me say from the onset that actually this application dated 04.06.19 is completely unnecessary and seems to have been filed just to demonstrate that whether it's the goose or the gander, both can twitch and flex muscles.

14. The applications were canvassed through written sub- arguments in both are more or less similar.

Mr Otieno on behalf of the applicant has invited this court to consider the definition of the terms status quo as found in Black's Law Dictionary a latin word which means “the situation as it exists.”

He adds that the Objector/Respondent ignored the situation as it existed on 08.05.2019, when the blue gum trees were standing on the disputed land, and got his agent to obtain clearance from the Assistant Chief **JONAH RUTTO** for cutting down the trees on 28.05.2019 – an event which happened in the presence of **SAMUEL KIPSONGOK MARITIM** (the area chief).

15. It is on account of this action that the Respondent is accused of intermeddling with the estate, and this court is urged to constitute contempt of its orders, for which he must be punished as his actions were deliberate.

16. Reference is made to **Section 5(1) of the Judicature Act** which confers powers on the High Court to punish for contempt of court, as well as **Section 45(1) of the Law of Succession Act** which prohibits intermeddling with property before grant of representation is obtained and **45(2)** of the same Act provides for punishment.

17. It is argued that the terms of the order were clear and unambiguous and binding on the Respondent. In consequence, the court is urged to invoke the provisions of Section 63(c) of the Civil Procedure Act so to prevent the ends of justice being defeated – the same provides that the court may:-

**“...grant a temporary injunction and in case of disobedience, commit the person guilty thereof to prison and order his property attached and sold.”**

18. Further that Order 40 Rule 3 of the Civil Procedure Rules ..... Also empowers the court to punish a person who is guilty of disobeying its orders. This court is urged to be guided by the decision in *KIMANJA KAMAU (suing as the personal representative of the estate of GIDEON GITUNDU KIMERE (deceased) V FRANCIS MWANGI MWAURA and another [2018] eKLR* which noted that:

**“Contempt is necessary for maintenance of law and order and so that the dignity of courts is upheld. It is trite law that every person against whom a court order is made against has unqualified obligation to obey the order however unpalatable the order may be until or unless the order is discharged or set aside.”**

19. The Respondent concedes that the order for maintenance of status quo was entered into by consent of the parties, but that all the parties herein were well aware of the prevailing situation on the ground which is that the objector is still in possession of the suit land and has been planting and harvesting trees and maize for his use and sustenance of his family's needs.

As far as he is concerned, utilization of the land involves activities affecting the resources thereto.

20. The Respondent argues that an order for status quo to be maintained does not necessarily act as an injunction against utilizing the land for farming practices citing the case of *BAOBAB BEACH RESORT* as cited *by Tuiyott (J) in SAIFUDEEN ABDULLAHI & 4 OTHERS in Mombasa HC. Misc. Civil Case No. 11 of 2012* that:

**“...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 an interlocutory stage, a prima facie case any other principles to be considered, the former is simply an ancillary order for the reservation of the situation as it exists in relation to pending proceedings before the hearing and determination.”**

21. It is the Respondent's contention that the terms status quo as used does not amount to being an order capable of attracting an order for contempt because the terminology depending on who is interpreting it could have a different meaning.

What was the content of the order issued on 08.05.2019?

22. The matter had commenced on 12.11.18 for hearing and proceeded again on 06.05.2019 – it was listed for hearing on 6 – 8<sup>th</sup> May when after cross examination of the objector by Mr Otieno on 7<sup>th</sup> May 2019.

The matter was to proceed for further cross examination 08.05.2019 but Mr. Omusundi on behalf of the objector urged the court that “in view of the un-folding in yesterday's proceedings we seek a further mention. The deliberation which will assist the court.”

The court then listed the matter for mention on 08.07.2019 and ordered

**“Existing status quo to be maintained.”**

What was the existing status quo then? It is common ground that

- a. It meant that the Respondent would remain in possession of the land,**
- b. He would continue using the land,**
- c. There were trees planted on the land which were then standing.**

Did it then mean that he could not cut down the trees/harvest them as he had been doing in the past. The order was silent on that, so that it would seem each party gave its own interpretation to suit its circumstances as regards status quo, so it was ambiguous. Certainly the most prudent thing would have been for the trees to be left untouched, but unfortunately that was not specified. It therefore becomes very difficult to visit blame on either party due to the ambiguity and not specificity as to what the existing status quo was.

It is on account of this that both applications must fail and are dismissed with regard to contempt.

However prayer (b) regarding conservatory orders of trees succeeds and is allowed. Each party shall bear its own costs.

**DATED, SIGNED and DELIVERED** at **ELDORET** this 19<sup>th</sup> day of September 2019.

**H. A. OMONDI**

JUDGE