



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 109 OF 2018

B2 YATTA RANCHING CO-OPERATIVE SOCIETY LTD.....PLAINTIFF

VERSUS

COUNTY COUNCIL OF KITUI.....1ST DEFENDANT

CEDRIC SAMMY MWANZIA.....2ND DEFENDANT

MUTHENGI MULAMBAYA.....3RD DEFENDANT

MUSYOKI SYUKI.....4TH DEFENDANT

NGUU NDONGA.....5TH DEFENDANT

BENSON NGUTHU.....6TH DEFENDANT

FESTUS MUSUMBA KAKYA.....7TH DEFENDANT

JOSEPH NDELI MUSYOKA.....8TH DEFENDANT

PIUS KAKONO KAU9TH DEFENDANT

GEOFFREY DIDINGA SAMBI.....10TH DEFENDANT

BEATRICE MATHEKA.....11TH DEFENDANT

MUNINI KITHAMI12TH DEFENDANT

THE ATTORNEY GENERAL.....INTENDED 13TH DEFENDANT

RULING

1. The two Applications before me are dated 5th March, 2020 and 31st March, 2020 by the 2nd to 6th Defendants and the 1st Defendant respectively. In the Application dated 5th March, 2020 by the 2nd to 6th Defendants, the 2nd to 6th Defendants are seeking for the following orders:

a) That an order of injunction be and is hereby issued restraining the 1st Defendant. The Commandant National Police Service Training Campus – Kitui, Abdullahi K. Adan, Engineer Jacob Kakundi, the intended 13th Defendant and all the parties to this suit whether by themselves, their agents, servants or otherwise howsoever from excising L.R. Number 12010 “the suit property” into sub-divisions or independent titles or implementing the Notice published in the Daily Nation of 14th February, 2020 or implementing the resolutions passed by the Plaintiff, 1st Defendant and the 13th intended Defendants at the 1st Defendants Boardroom on the 6th August, 2019 or changing the character of the suit property or extending the various parties areas of occupation in the suit property or carrying out any constructions or excavations on the suit property pending the hearing and determination of this suit.

b) That Abdullahi K. Adan and Engineer Jacob Kakundi be committed to Prison for a term not exceeding six (6) months for

being in contempt of the court orders of the 12th February, 2009, 17th June, 2010, 22nd January, 29th July and 24th September, 2019 preserving the suit property.

c) That the costs of this Application be borne by the 1st and 13th intended Defendants.

2. The Application is supported by the Affidavit of the 2nd Defendant who has deponed that he is the Secretary of Nguamuka Farmers Environment Conservation Group “*the Society*”; that this suit was filed by the Plaintiff in the year 2008 and that the 2nd to 6th Defendants were subsequently joined in the suit.

3. The 2nd Defendant deponed that on 12th February, 2009, the court ordered that the *status quo* in the suit property be maintained until the matter proceeds for trial; that as at the time of making the orders, the Administration Police were occupying a small portion of the suit property measuring 300 acres and that the suit property is over 30,000 acres.

4. According to the 2nd Defendant, on 24th September, 2019, the 1st Defendant, in conjunction with the representatives of the Attorney General, members of the Administration Police Campus, amongst others, attended a meeting in which they resolved that there should be demolition of the structures standing on the suit property; the construction of the hostels and the residential quarters on the suit land to proceed and the suit to be frustrated to allow the ongoing developments on the suit property.

5. The 2nd Defendant deponed that during the period from 12th to 16th August, 2009, he saw a helicopter and a drone flying over the suit property carrying out aerial survey of the suit property and that the 1st Defendant declared in its boardroom of its intentions to frustrate the proceedings herein.

6. The 2nd Defendant deponed that on 14th February, 2020, the 1st Defendant published a notice in the Daily Nation where it advertised the completion of Part Development Plans for the entire suit property and that the 1st Defendant has earmarked the suit property as follows: 1,887.03 Ha for the benefit of the Administration Police; 1,213.80 for the settlement of squatters; 4,440 Ha for the expansion of Musingi Market and 4.00 Ha for the benefit of Daughters of Jesus the Good Shepherd and that the notice was published for the sole purpose of implementing the resolutions of 6th August, 2019.

7. The 2nd Defendant lastly deponed that the notice that was published by the 1st Defendant was in violation of the orders of the court made on 12th February, 2009; that the commandant of the Administration Police has changed and continues to change the character of the suit property by excising and appropriating the same and that on account of the violation of the court orders, Abdullahi K. Adan, Jacob Kakundi and Nicholas Mutua should be cited for contempt and sent to prison to serve a jail term of not exceeding six months.

8. In the Application dated 31st March, 2020, the 1st Defendant has sought for the following orders:

a. That the Honourable Court be pleased to vacate and set aside the court’s orders issued on 19th March, 2020 specifically prohibiting the 1st and 13th Defendants, their officers, agents, the CEC member for Lands Engineer Jacob Kakundi and the Commandant of the National Police Service Training, College- Kitui Abdullahi K. Adan from further construction on the suit land and allow the 13th Defendant and its officers and or agents to continue with the activities of developing the portion of the allocated suit land and continuing with the land use plan for L.R. No. 12010.

b. That the Honourable Court set aside the order of 19th March, 2020 prohibiting the 1st Defendant from alienating the suit land and allow the 1st Defendant to complete the planning process as per the Physical Planning and Land Use Act of 2019.

c. That pending the hearing and determination of this Application, the Honourable Court restrain the 2nd to 12th Defendants from any intended interference, encroachment and or occupation of apportion measuring 5300 acres currently occupied and in possession of the 13th Defendant.

d. That pending the hearing and determination of this Application as a matter of urgency and before the 2nd to 12th Defendants are heard in this Application, the 2nd to 6th Defendants be required to furnish security for costs as a condition for issuance of any orders affecting the 1st Defendant as the suit land does not belong to them and hence these continued Applications is causing inconvenience to the 1st and 13th Defendants.

e. That no prejudice will be suffered if the orders sought herein are issued.

f. That the continued existence of the orders issued on 19th March, 2020 prejudices the 1st Defendant/Applicant.

g. That costs of this Application be in the cause.

9. The Application is supported by the Affidavit of the 1st Defendant’s County Executive Committee Member responsible for Land, Infrastructure, Housing and Urban Development, Kitui County, who deponed that the 1st Defendant has been prejudiced by the orders of 19th March, 2020 and that the portion of land measuring 5,300 acres of L.R. No. 1210 currently houses the headquarters of the Border Police Unit and the National Police Service Border Police Training Campus as well as a field training ground for the two institutions.

10. According to the 1st Defendant, if the 2nd to 6th Defendants have any claim, then such a claim ought to be made in accordance with the provision of the law; that the 1st Defendant has completed the preparation of a Part Development Plan for L.R. No. 12010 in which they have proposed the excision of the land for the extension of the police training camp; for settling squatters; for expansion of the Musingo Market and for the Daughters of Jesus/the good Shepherd.

11. The 1st Defendant's County Executive deponed that the Gazette Notice No. 1405 dated 21st February, 2020 announced to the general public that the Part Development Plan had been deposited for the public inspection; that the 2nd to 6th Defendants raised their objections through their advocate and that the 2nd to 6th Defendants have never produced evidence to show that they occupy the suit property.

12. The 2nd to 6th Defendants filed their Grounds of Opposition to the 1st Defendant's Application. According to the 2nd to 6th Defendants, the orders that were granted on 19th March, 2020 were meant to preserve the suit property; that the 1st Defendant has admitted publishing a gazette notice with the intention of excising the suit property and that the excision of the suit property will extinguish the suit property.

13. The Plaintiff's Chairman swore an Affidavit in which he deponed that he supports the orders of injunction as against the 1st Defendant; that the Plaintiff was left out in the Part Development Plan despite the earlier agreement between the Plaintiff, the 1st Defendant and the 13th Defendant which required the Plaintiff to be allocated 10,200 acres of the suit land and that there are two active matters in this court pertaining to the suit land.

14. It was the deposition of the Plaintiff's Chairman that the publication of the Part Development Plan by the 1st Defendant was in contravention of the orders of the court dated 29th July, 2019 and that the Plaintiff has no objection to the developments of the land by the 13th Defendant but oppose the sub-division of the entire land by the 1st Defendant as proposed as the excision of the land and development does not take into consideration the proprietary interest of the Plaintiff.

15. The 2nd to the 6th Defendant's advocate submitted that the suit property is Community/Trust land; that the Application dated 26th June, 2019 filed by the 2nd to 6th Defendants for injunction is distinguishable from the current Application and that the current Application was prompted with the publication of the Part Development Plan in respect to the suit land.

16. Counsel submitted that the proposed sub-division of the suit property by the 1st Defendant seeks to obliterate the suit property; that should the 1st Defendant sub- divide and allocate the suit property, there will be nothing left to litigate over; that the 1st Defendant, in a meeting held on 8th August, 2019, discussed on how to frustrate the current suit and that the suit property should be preserved pending the hearing of the suit.

17. On his part, the 1st Defendant's advocate submitted that the suit land is approximately 30,000 acres; that the Administration Police has been allocated 5,000 acres and that none of the 2nd to the 6th Defendants live on the suit property.

18. The 1st Defendant's advocate submitted that the suit property is Public land as defined by the Constitution; that the Administration Police is a public organ sitting on public land; that the suit land was previously leased to the Plaintiff and that the said Lease expired. According to the 1st Defendant's advocate, the 2nd to the 6th Defendants do not have a Counter-claim; that it is the Plaintiff who can seek for an injunction and that the court has already held that the 2nd to 6th Defendants can claim for compensation in the event their claim succeeds. According to the 1st Defendant's advocate, the issues raised in the current suit were settled by the court in its Ruling of 24th April, 2020.

19. The 13th Defendant's advocate submitted that the suit land is neither community land nor Trust land; that the suit land is Public land as defined by the Constitution; that the Ruling of this court delivered on 24th April, 2020 found that the Plaintiff did not have a prima facie case and that the 1st Defendant can deal with the suit land.

20. The 13th Defendant's counsel submitted that the 2nd to 6th Defendants admitted in their Affidavit that they were allocated 19,000 acres; that the suit property is 30,000 acres; that the impugned Part Development Plan is only in respect of 8,000 acres and that the process of the Part Development Plan should be allowed to go on.

21. The Plaintiff's advocate submitted that the Plaintiff is entitled to 13,000 acres of the suit land; that the suit land should be preserved pending the hearing of the suit and that the process of preparing the Part Development Plan by the 1st Defendant should be stopped.

Analysis and findings:

22. This suit was commenced by way of a Plaint dated 14th February, 2008 in which the 1st Defendant was the only Defendant. In the original Plaint, the Plaintiff averred that it is in the business of Ranching and that prior to 1974, the Plaintiff existed as two separate Societies, namely, B2 Yatta Kanyonyooni Ranching Co-operative Society and B2 Katoteni Ranching Co-operative Society Limited.

23. The Plaintiff averred in the Plaint that B2 Yatta Kanyonyooni Ranching Co-operative Society Limited and Katoteni Ranching Co-operative Society Limited were registered under the Co-operative Societies Act.

24. The Plaintiff further averred that on 10th January, 1967, vide Gazette Notice Numbers 183 and 184, the 1st Defendant set apart two blocks of Trust Land and Leased them to Katoteni Ranching Co-operative Society Limited and B2 Yatta Kanyonyooni Ranching Co-operative Society Limited respectively; that the blocks that were set apart were L.R. No. 11802, leased to B2 Yatta Kanyonyooni, and L.R. No. 12010 leased to Katoteni Ranching Co-operative Society Limited.

25. The record shows that on 6th March, 2008, the 2nd -7th Defendants filed an Application seeking to be enjoined in the suit on the ground that they are residents on L.R. No. 12010 measuring approximately 30,200 acres. In his Affidavit, the 2nd Defendant deposed that he is the Secretary of “*Katotení Nguamuka Farmers Environmental Conservation*” and that it was just and necessary for the Intended Defendants to be enjoined in these proceedings to enable the court effectively and completely adjudicate upon and settle all the questions involved in the suit.

26. The record shows that by way of a Notice of Motion dated 26th July, 2019, the 2nd to the 6th Defendant sought for an order of injunction “*preserving the character of L.R. No. 12010 by restraining all the parties to these proceedings including the commandant, National Police Service Training Campus Kitui, the intended 13th Defendant, from evicting, destroying property or homes, carrying out constructions, extending the portions they are occupying in the suit property pending the carrying out of the survey exercise ordered by the court on 18th June, 2019 and the final determination of the suit.*”

27. In its Ruling dated 24th April, 2020, the court dismissed the said Application. In the said Ruling, this court held as follows:

“... if the 2nd – 7th Defendants’ claim is that the National Government is appropriating their land measuring 5,300 acres, then they can seek for compensation but not injunction.”

28. Indeed, the gravamen of the 2nd to 6th Defendant’s Application dated 26th July, 2019 was that the National Police had only been allocated 300 acres of the suit land, and that the National Police had extended the boundaries of their land to 5,300 acres and were in the process of evicting them from the suit land. The Ruling of this court was therefore in respect of the 5,300 acres of land that was being claimed by the National Police, and not the entire suit property.

29. In the current Application, the 2nd to 6th Defendants have placed before this court a notice published in the Daily Nation Newspaper of 14th February, 2020 stating as follows:

“PDP NO. KTI/271/KITUI 2019/02 RURAL: Proposed excision of LR NO. 12010 INTO:

i. Extension of Boarder Police Training Campus (887.03 Ha)

ii. Squatter settlement scheme (1213.80 Ha)

iii. Expansion of Musingi market (4.140 Ha)

iv. Proposed daughters of Jesus, the good shepherd (4.00 Ha) Notice is hereby given that preparation of the above named Part Development Plan has been completed...”

30. The said public notice was signed by the 1st Defendant’s County Executive Committee Member, Lands, Infrastructure, Housing and Urban Development, Engineer Jacob Kakundi. It is obvious that while this suit was pending, the 1st Defendant was preparing a Part Development Plan in respect to the suit property. Indeed, the prepared Part Development Plan is in respect to not only the land that the National Police is claiming, but also in respect to some entities that are not before the court.

31. The 1st Defendant’s County Executive Committee Member, Lands, Infrastructure, Housing and Urban Development, Engineer Jacob Kakundi, has admitted in his Affidavit that the 1st Defendant has completed a Part Development Plan in respect to the suit property for excision of land as indicated in the public notice of 14th February, 2020.

32. In his Affidavit, Engineer Kakundi further stated as follows:

“13. THAT I signed the Gazette Notice No. 1405 dated February, 21, 2020 under the requirements of the Physical Planning and Land Use Act, 2019, announcing to the general public that the Part Development Plan has been deposited for public inspection during office hours, at the office of the Chief Officer responsible for lands, for a period of 60 days.”

33. The 1st Defendant has been a party to this suit since the year 2008 when the suit was filed in the High Court. The record shows that on 12th February, 2009, Lenaola J. (as he was then) allowed the Plaintiff’s Application dated 16th February, 2008 as follows:

“That Application dated 16th February, 2008 is to be determined by way of an order of status quo to be maintained and matter to proceed to trial.”

34. The above order of *status quo* was made in the presence of the 1st Defendant’s advocate. On 29th July, 2019, the parties herein entered into a consent order, which was adopted by the court, in the following terms:

“2. THAT the prevailing status quo to be maintained until then, meaning that there should be no demolition of structures on the land, or construction of new structures until 24/09/2019.”

35. On 24th September, 2019, this court made further orders as follows:

“THAT the suit property be preserved in the state that it is in now.”

36. The meaning of the word “*status quo*” was clarified by the Court of Appeal in the case *Shimmers Plaza Limited vs. National Bank of Kenya Limited* [2015] eKLR as follows:

“Status quo” in normal English parlance means the present situation, the way things stand as at the time the order is made, the existing state of things. It cannot therefore relate to the past or future occurrences or events. We fail to see what can be ambiguous about that order. All it meant was that everything was to remain as it was as at the time that order was given. If there was any transaction of whatever nature that was going on in respect of the land in question, it had to freeze and await the discharging of the Court order.”

37. The order of maintaining the *status quo* in respect to the suit property in all the three instances was granted by the court in the presence of the Defendants’ advocates. Indeed, the current jurisprudence only requires a party’s advocate to be aware of the court order for the purposes of an Application for contempt. In the *Shimmers Plaza* case (*supra*), the Court of Appeal held as follows:

“On the other hand however, this Court has slowly and gradually moved from the position that service of the order along with the penal notice must be personally served on a person before contempt can be proved. This is in line with the dispensations covered under 81.8 (1) (supra). Kenya’s growing jurisprudence right from the High court has reiterated that knowledge of a court order suffices to prove service and dispense with personal service for the purposes of contempt proceedings. For instance, Lenaola J in the case of Basil Criticos Vs Attorney General and 8 Others [2012] eKLR pronounced himself as follows:- “...the law has changed and as it stands today knowledge supersedes personal service.....where a party clearly acts and shows that he had knowledge of a Court Order; the strict requirement that personal service must be proved is rendered unnecessary.” This position has been affirmed by this Court in several other cases including the Wambora case (supra).”

38. The 1st Defendant’s County Executive Committee Member, Engineer Kakundi has not informed this court why he prepared the Part Development Plan in respect to the suit property and had it published in the Daily Nation newspaper of 14th February, 2020 while the orders of the court for maintenance of *status quo* were in existence.

39. Indeed, instead of responding to the Applicants’ depositions that he disobeyed the orders of this court, Engineer Kakundi confirmed the said disobedience of the orders of the court by stating that he had signed a Gazette Notice No. 1405 dated 21st February, 2020 announcing to the general public about the Part Development Plan.

40. The publication of the Part Development Plan in respect of the suit property in the Daily Newspaper and the Kenya Gazette by Engineer Kakundi during the pendency of the orders of *status quo* by this court, with a view of sub-dividing the suit property into four portions, are an affront to the rule of law. The obligation by all persons to obey court orders at all times has been reinstated by the courts for the umpteenth time. In *Hadkinson vs. Hadkinson*, (1952) ALL ER 567, Romer, L.J held as follows:

“It is the plain and unqualified obligation of every person against, or in respect of, whom an order is made by a court of competent jurisdiction to obey it unless and until that 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 an order believes it to be irregular or even void.”

41. In the case of *Chuck vs. Cremer (1) (1 Coop. temp. Cott 342)*, Lord Cottenham, L.C., held as follows:

“A party, who knows of an order, whether null or valid, regular or irregular, cannot be permitted to disobey it... It would be most dangerous to hold that the suitors, or their solicitors, could themselves judge whether an order was null or valid- whether it was regular or irregular. That they should come to the court and not take upon themselves to determine such a question. That the course of a party knowing of an order, which was null or irregular, and who might be affected by it, was plain. He should apply to the court that it might be discharged. As long as it exists it must not be disobeyed.”

42. The 1st Defendant’s County Executive Committee Member, Engineer Kakundi, disobeyed the orders of this court by publishing a Gazette Notice number 1405 dated 21st February, 2020 under the requirements of the Physical Planning and Land Use Act, 2019 announcing to the general public that the Part Development Plan in respect to the suit property has been deposited for public inspection during office hours. The said contemnor also published the same Part Development Plan in the Daily Nation Newspaper of 14th February, 2020.

43. On that basis, this court finds Engineer Jacob Kakundi to have been in contempt of the orders of 12th February, 2009 and 24th September, 2019 preserving the suit property. On the other hand, there is no evidence that Abdullahi K. Adan, Commandant, National Police, Border Police Unit, disobeyed the order of 12th February, 2009 and 24th September, 2019, or at all.

44. I say so because the 13th Defendant was not a party to this suit in the year 2009 when the order of 12th February, 2009 was granted. Furthermore, the evidence before this court shows that the National Police, Border Police Unit, has at all material times been in occupation of a portion of the suit property, with the only dispute being whether they are in possession of 300 acres or 5,300 acres. This fact has been admitted by all the Defendants and the Plaintiff.

45. Considering that as at 24th September, 2019, the court had not determined the question of the acreage of the land that is occupied by the National Police, Border Police Unit, and in view of the Ruling of this court of 24th April, 2020 in which the 2nd to the 6th Defendants’ Application for injunction *vis-a-vis* the 5,300 acres, I find that the said Abdullahi K. Adan, Commandant, National Police, Border Police Unit, is not in contempt of the orders of this court.

46. The last issue for determination is whether an injunction should issue in respect of the excision of L.R. No. 12010 into independent titles as published in the Part Development Plan by the 1st Defendant. Considering that Lenaola J. (*as he was then*) did direct that the *status quo* in respect of L.R. No. 12010 should be maintained pending trial, and that order having not been set aside, the sub-division of the suit property by the Defendants, or any other entity should be stopped.

47. Indeed, and as correctly submitted by the 2nd to the 6th Defendants' counsel, the sub-division and alienation of the suit property to third parties will obliterate the suit property, thus taking away the substratum of the suit. It has been established by the law and decided cases that the main purpose for issuance of a temporary injunction order is the preservation of the suit property and the maintenance of the *status quo* between the parties, pending the disposal of the main suit (*See Fessenden vs. Higgs and Hill Ltd [1935] ALL ER 435*).

48. That being so, and the court having made a Ruling on 24th April, 2020 dismissing the 2nd to 6th Defendants Application in respect to the utilisation of the 5,300 acres of the suit property by the National Police, Border Police Unit, pending the hearing of the suit, the *status quo*, as ordered by the court on 12th February, 2009 should be maintained pending the hearing of the suit.

49. For the reasons I have given above, I dismiss the 1st Defendant's Application dated 31st March, 2020 with costs and allow the 2nd to the 6th Defendants' Application dated 5th March, 2020 as follows:

a) Engineer Jacob Kakundi, the 1st Defendant's County Executive Committee Member, Lands, Infrastructure, Housing and Urban Development, be and is hereby found to be in contempt of the orders of this court of 12th February, 2009, 29th July, 2019 and 24th September, 2019.

b) The said Engineer Jacob Kakundi, the 1st Defendant's County Executive Committee Member, Lands, Infrastructure, Housing and Urban Development, to appear in this court for mitigation and sentencing.

c) Save for the utilisation of the 5,300 acres of the suit property by the National Police, Border Police Unit, the status quo, as ordered by the court on 12th February, 2009, to be maintained pending the hearing of the suit.

d) The 1st Defendant to pay the costs of the Application.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 15TH DAY OF JULY, 2020.

O. A. ANGOTE

JUDGE