



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU
CIVIL CASE NUMBER 71 OF 1994

UKINGONI FARM LIMITED.....DECREE HOLDER/APPLICANT

VERSUS

NGENDALEL KOIYO FARM LTD.....JUDGMENT DEBTOR/RESPONDENT

RULING

1. The Applicant and Decree holder in this court by its Notice of Motion dated 26th March 2015 approached the court for orders

1. Spent

2. Spent

3. That a conservatory order do issue maintaining the *status quo* in respect of parcels of **Land No 8437 and 10762** as enjoyed by the shareholders of the decree holder/Applicant and restraining the destruction of plants and crops as well as amenities forming part of the suit property pending the outcome of the intended appeal.

4. That the court do issue directions as to the occupation of the parcels of **Land LR Nos 8437 and 10762** as well as the status of the intended Appeal.

The application is based on the grounds stated at the face of the application and affidavit sworn on the 26th March 2015 by the director of the applicant company.

2. The application is opposed by a replying affidavit sworn by a director of the respondent company on the 20th April 2015.

Brief background leading to the application is that judgment was delivered in favour of the applicant on the 13th October 2006. Being aggrieved by the judgment, the respondent filed a Notice of Appeal on the 16th November 2006, and also obtained an order of stay of execution pending hearing of the intended appeal on the 4th May 2010 by a consent order. The applicant however sought to set aside the consent order for stay of execution on grounds that no appeal had been filed but on the 24th July 2014 the court dismissed the said application.

3. Following the dismissal order, the applicant states that the shareholders of the Respondent have increased their interference with suit properties, by entering and claiming ownership of the properties and have encroached on the already demarcated portions that are being used by the applicants shareholders. It is stated that there is tension between the two rival groups shareholders

as each claim rights of ownership, and have been destroying and cutting down indigenous trees. It is stated that if the suit properties are not preserved by a conservatory order, all the investments therein will be damaged by the Respondents shareholders under the mistaken belief that they are entitled to entry and occupation of the suit properties.

4. The Respondent in opposing the application stated that its shareholders are in occupation of the suit property and have a claim of ownership having been in such occupation for over 40 years and that there is a stay of execution order in place against the court's judgment. It is stated that the application as filed is *Res Judicata* the same issues having been adjudicated upon. The respondent has denied any acts of destruction of investments and public utilities by its members. The court has been urged to disallow the application.

5. Mr. Moibi Mose Advocate for the Judgment debtor swore an affidavit on the 7th October 2013 and explained that after the order to reconstruct the court file, he obtained an order of stay of execution pending hearing of the Intended Appeal on the 26th January 2012, and that he had not been able to obtain typed proceedings and exhibits emanating from the original court file which could not be traced, and efforts to trace the said file had not been spared and demonstrated so by writing and seeking intervention from the court's administration. As at April 2015, the missing court file had not been traced and therefore no Record of Appeal has been filed.

The judgment and decree of the court dated 13th October 2006 gave the plaintiff shareholders occupation rights over the suit properties and an order of eviction of the defendants shareholders from the said properties and a perpetual injunction against the defendants shareholders from entering and or remaining on the properties.

By a consent order registered by both parties on the 4th May 2010, execution of the court's decree was granted pending hearing and final determination of the intended appeal on condition that taxed costs was paid to the respondents plaintiffs advocates. An attempt to set aside the consent order was rejected by the court on 25th July 2014.

6. The application under consideration seeks conservatory orders to maintain *status quo* in respect of the two land parcels.

What this court ought to determine is what the *status quo* was obtaining as at the date of the court's judgment and decree for it to determine whether or not to grant the said orders. *Status quo* must be definite and ascertainable.

To determine the *status quo* the court has considered the plaint, the defence and counterclaim it is established that at the commencement of the suit, the plaintiffs shareholders were in occupation of the suit land parcels together with the Defendants shareholders who were occupying demarcated and ascertained area of portion of the suit land.

To that end, *status quo* would then mean that each party's shareholders continue in occupation of the portions they were in occupation at the beginning date of the judgment, and that each should refrain from interfering in whatever manner with the opposing party's portion by destroying, cutting down or damaging any of the investments pending hearing and determination of the appeal.

A conservatory order is made to facilitate presentation of a property, to prevent it from being wasted or damaged pending occurrence of an event. It is not an injunction. The applicant has to shown that it has some interest by which its rights or liabilities are affected. In my view, both parties have interest in the suit premises.

7. In **High Court Constitutional Petition No 244 of 2014 (Nairobi)**, the Learned Judge stated that a party seeking a conservatory order only requires to demonstrate that he has a *prima facie*

case with a likelihood of success and that unless the court grants conservatory order, there will be red danger that he will suffer prejudice as a result of the violation or threatened violation of their constitutional rights.

The remedy of conservatory order is meant to keep the subject matter of the dispute *insitu* It is a remedy in respect of particular state of affairs as opposed to injunctive orders which may only attach to a particular person. It is a class remedy.

8. Having stated as above, should then a conservatory order be issued as prayed by the applicant?

There is in force a stay of execution of the decree of the court. Both the the applicant and respondent shareholders are in occupation of the suit properties as stated above.

The applicant has alleged damage to the investments and public utilities which are not specified as well as indigenous trees. Both parties have ownership rights over the same until the Court of Appeal determine who goes with the ownership. (This court had given ownership rights to the Applicant) which is subject to appeal. Until such ownership is determined on appeal, both parties shareholders are under an obligation to conserve and preserve the suit property by not committing acts of damage or destruction on the investments standing on the said properties.

It is this court's view that both the applicant and the respondent shareholders ought to maintain the *status quo* as determined above in respect of the suit properties and restrain themselves from destruction of any plants crops, investments and all other amenities thereon until such time that the dispute on ownership is determined by the Court of Appeal.

The court shall therefore allow the Decree holders application dated 26th March 2015 in terms of **Prayer No 3**, but varied to read as follows:

(a) That a conservatory order is hereby issued maintaining the *status quo* in respect of the land parcels **LR Nos 8437 and 10762** as enjoyed by the shareholders of both the decree holder/applicant and the Judgment debtor/Respondent and restraining the destruction of plant, crops, investments and amenities forming part of the suit properties pending the hearing and determination of the intended appeal.

(b) That the Applicant's and Respondent's shareholders are directed to continue in occupation of the portions that they were so occupying as at the date of the decree of this court pending the hearing and determination of the intended appeal

(c) That the original court file not having been traced to date to facilitate preparation and filing of the Records of Appeal since 13th October 2006, parties shall take a mention date before the Judge to take directions on the forward.

(d) Each party shall bear its costs on the application.

(e) Mention on the 18th day of December 2015.

Dated, signed and delivered in open court this 3rd day of December 2015

JANET MULWA

JUDGE

