



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC. CASE NO. 85 OF 2019

LOISE WAMBUI THUO T/A EXPORT SOLVE AGENCIES.....PLAINTIFF

VERSUS

GEORGE ATENYA.....1ST DEFENDANT

NOVELTY MANUFACTURING LTD.....2ND DEFENDANT

USHINDI COMMUNICATIONS LTD.....3RD DEFENDANT

ALLCAN AGENCY NETWORK LIMITED.....4TH DEFENDANT

THE CHIEF LAND REGISTRAR.....5TH DEFENDANT

THE NATIONAL LAND COMMISSION.....6TH DEFENDANT

THE DIRECTOR OF SURVEYS.....7TH DEFENDANT

THE ATTORNEY GENERAL.....8TH DEFENDANT

RULING

1. This Ruling is in respect to two Applications, both filed by the Plaintiff. In the Application dated 7th January, 2020, the Plaintiff has sought for the following orders:

a) Spent;

b) This Honourable Court be pleased to grant leave to the Plaintiff to further amend the Amended Plaint registered in court on 7th November, 2019 as well as the Plaintiff's List of Documents and List of Witness dated 25th July, 2019 and registered in court on 25th July, 2019;

c) The Further Amended Plaint, Amended List of Documents and Amended List of Witnesses filed together with this Application be deemed properly on record upon payment of requisite court fees; and

d) The costs of this Application be in the cause.

2. The Application was supported by the Affidavit of the Plaintiff who deponed that on 21st November, 2019, she appointed the firm of B.M. Musau & Co., Advocates to represent her in this suit in place of Wesonga, Mutembei & Kigen Advocates (*'former advocates on record'*) and that her current advocate advised her that the Amended Plaint has several gaps which are prejudicial to her case.

3. It was deponed that there are more documents in the Plaintiff's custody in support of her; that she was advised that the List of Documents dated 25th July, 2019 and registered in court on 25th July, 2019 ought to be amended and that she has two more witnesses and as such, the List of Witnesses registered in court on 25th July, 2019 ought to be amended to include the two other witnesses. The Application was not opposed.

4. In the Application dated 3rd June 2020, the Plaintiff has sought for following orders:

(a) Spent;

(b) The Court be pleased to grant an order allowing the Plaintiff to make some improvements on the suit property due to the COVID-19 pandemic situation and in line with the health guidelines issued by the World Health Organisation (“the WHO”) and the Ministry of Health (“the MoH”). The anticipated improvements are to build a new toilet, build a new bathroom, drain the suit property and cut down grass and to build a stone wall around the suit property to prevent rain water from accumulating in the suit property (“the improvements”).

(c) The costs of the Application be provided for.

5. The Plaintiff deponed that on 18th September, 2019, the Court ordered that the prevailing *status quo* in respect of the suit property be maintained pending the hearing and determination of the suit; that after the heavy rains that took place between October, 2019 and February, 2020, the suit property was flooded with water; that the Mabati house where the security guards live was destroyed; that the bathroom was swept away and that the pit latrine is overflowed.

6. The Plaintiff deponed that due to the COVID-19 pandemic situation and the requirement by the MoH to maintain high standards of hygiene to curb the spread of the disease, the toilet and bathroom need to be reconstructed urgently; and that the Mabati house requires to be urgently renovated to ensure that the health of the security workers is not at risk.

7. The Plaintiff finally deponed that there is also an urgent need to drain the suit property which is now soaked with water and construct a stone fence to prevent recurrence of the floods when the rains fall and that the grass has grown to above five feet and should be cut down or trimmed to prevent the breeding of mosquitoes.

8. The Application was opposed by the Principal Director of the 4th Respondent who deponed that the Applicant has sought to reinvent her previous Application; that the Plaintiff is seeking to reenter the suit property and make changes and that the Applicant has not proved that there are security guards on the suit property.

9. It was deponed that the 4th Defendant is also claiming title and ownership to the suit property; that the grant of the orders sought would be akin to evicting the 4th Defendant from the suit property and that the Application should be dismissed.

10. The Applications were canvassed vide written submissions. Considering that the Application dated 7th January, 2020 was not opposed, I will not recite the Plaintiff’s submissions on that Application. Indeed, in his submissions, the 4th Defendant’s advocate urged this court to allow the Application dated 7th January, 2020.

11. In respect of the Application dated 3rd June, 2020, it was submitted that when the court issued the *status quo* order, none of the parties anticipated that the present situation precipitated by COVID-19 would arise and that the circumstances of the COVID-19 pandemic require urgent intervention.

12. Reliance was placed on the case of *John Simiyu Khaemba & Another vs. Cooperative Bank of Kenya & Another [2019] eKLR*, where the court listed the requirements for grant of a review order as:

a) Show sufficient cause/reason why the review should be granted;

b) The review does not seek to reopen the Application leading to the grant of the orders sought to be reviewed;

c) The Application must be brought without unreasonable delay; and

d) The unforeseen circumstances must have cropped up after the issuance of the orders and the unforeseen circumstances must have adversely affected and impacted on the compliance with the court orders.

13. According to counsel, the second Application complies with the conditions for the grant of an order reviewing the order of *status quo* issued on 18th November, 2019 and that as at the time that the court ordered that the *status quo* in respect of the suit property be maintained pending the hearing and determination of the suit, the Plaintiff was in possession of the suit property and that the same is uninhabitable hence necessitating the grant of the order sought.

14. The 4th Defendant’s/Respondent’s submitted that the inherent powers of this court must be exercised judiciously to ensure the court’s process is not abused. Reliance was placed on the *Halsbury’s Laws of England, 4th Edn. Vol. 37 Para. 14* where it was rendered as follows:

“The jurisdiction of the court which is comprised within the term “inherent” is that which enables it to fulfil itself, properly and effectively, as a court of law. The overriding feature of the inherent jurisdiction of the court is that it is part of procedural law, both civil and criminal, and not part of substantive law; it is exercisable by summary process, without plenary trial; it may be invoked not only in relation to the parties in pending proceedings, but in relation to anyone, whether a party or not, and in relation to matters not raised in litigation between the parties; it must be distinguished from the exercise of judicial discretion; it may be exercised even in circumstances governed by rules of court. The inherent jurisdiction of the court enables it to exercise control over process by regulating its proceedings, by preventing the abuse of the process and by compelling the observance of the process ... In sum, it may

be said that the inherent jurisdiction of the court is a virile and viable doctrine and has been defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them.”

15. Counsel submitted that the Plaintiff's averments that heavy rains between October, 2019 and February, 2020 have caused flooding of the suit property is information that was discovered after the recording of the consent order and therefore not within the scope of Order 45.

16. According to counsel, the issue of ownership of the suit property remains contentious. While citing the case of *Samco Holdings Limited t/a Eka Hotel vs. Patrick Nyamweya (2018) eKLR*, it was submitted that where there are serious conflicts of facts, the court ought to maintain *status quo* until the dispute is heard and determined in a trial. Also cited was the holding by the Court of Appeal in the case of *Joash Ochieng Ougo & Another vs. Virginia Edith Wambua Otieno (1987) KLR 364* that was as follows:

“The general principle is that where there are serious conflicts of facts, the trial court should maintain the status quo until the dispute has been decided in a trial.”

17. The court was invited to consider the case of *John Kinyua Rimberia vs. Sarah Mosiori & Another [2014] eKLR* where it was stated that the court was not ready to hold the Plaintiff had demonstrated a *prima facie* case with probability of success against the Defendant at the interlocutory stage and ordered parties to maintain the *status quo* of the suit property such that no party effects any further development and/or purports to alienate and/or dispose of the property until the suit is heard and determined.

Analysis and findings:

18. In the Application dated 7th January, 2020, the Plaintiff is seeking for leave to further amend the Plaintiff; the List of Documents and Witness Statements. Considering that the Application is not opposed, and having considered the reasons given for the proposed amendments, I allow the Application but with no order as to costs.

19. In respect to the Application dated 3rd June, 2020, the Applicant is seeking a variation/review of the consent order of 18th September, 2019 which stipulated as follows:

“That the prevailing status quo in respect to the suit properties be maintained pending the hearing of the suit.”

20. The Plaintiff is seeking for the variation of the order of *status quo* to allow her to make some improvements on the suit property by building a new toilet; a new bathroom; a stone wall around the suit property and to drain the suit property and cut down the grass.

21. It is the Plaintiff's case that due to the COVID-19 pandemic situation and the requirement by the MoH to maintain high standards of hygiene to curb the spread of the disease, the toilet and bathroom need to be reconstructed urgently; and that the Mabati house requires to be urgently renovated to ensure that the health of the security workers is not at risk.

22. Although the “*prevailing status quo*” that was prevailing as at the time the consent order of 18th September, 2019 was recorded was not defined by the parties, the Court of Appeal in the case of *Shimmers Plaza Limited vs. National Bank of Kenya Limited [2015] eKLR* defined the term “*status quo*” 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.”

23. In *Samuel Wambugu Mwangi vs. Othaya Boys High School Civil Appeal No. 7 of 2014 [2014] eKLR*, the court considered the circumstances under which a consent order may be varied or set aside as follows:

“...Circumstances under which a consent judgment may be interfered with were considered in the case of Brooke Bond Liebig (T) Limited Vs Maliya (1975) E.A. 266. It was stated that prima facie, any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action and those claiming under them and cannot be varied or discharged unless obtained by fraud or collusion or by an agreement contrary to the policy of the court or if the consent was given without sufficient material facts or in general for a reason which would enable the court to set aside an agreement.”

24. In *Kenya Commercial Bank Limited vs. Benjoh Amalgamated Limited & Another Civil Appeal No. 276 of 1997 [1998] eKLR*, it was observed that:

“...It is now settled law that a consent judgment or order has contractual effect and can only be set aside on grounds which would justify setting a contract aside, or if certain conditions remain to be fulfilled, which are not carried out...”

25. As I have indicated above, the *status quo* order was entered into by the consent of the parties. Indeed, all the parties were represented by advocates when the said consent was recorded. That being the case, the parties must have known about the actual situation of the suit property, with or without COVID 19.

26. If indeed the suit property was occupied as at the time of entering into the consent order, the Plaintiff, or her counsel knew, or ought to have known that the occupants of the suit property would need a toilet, a bathroom and that at some particular point, it would rain. That

being the case, the issue of the COVID 19 pandemic having necessitated the change of the prevailing status of the suit property as at the time the order of 18th September, 2019 was recorded does not arise.

27. Indeed, the issue of the Plaintiff or her security guards being in occupation of the suit property was never addressed as at the time the consent order of 18th September, 2019 was recorded. Allowing the current Application will in essence be an acknowledgement that it is the Plaintiff who is in possession of the suit property, which issue should have been argued in the Plaintiff's Application for injunction dated 28th July, 2019.

28. Having not argued the Application for injunction, the Plaintiff would be stealing a march from the Defendants if the court allows the current Application by allowing the change of the status of the suit property.

29. Indeed, the perusal of the Plaintiff's Application shows that there is no compelling new discovery of evidence that has been brought to the attention of this court, neither is there an error on the face of the record, to warrant the review of the consent order of 18th September, 2020.

30. As was held in the case of *Joash Ochieng Ougo (supra)*, where there are serious conflicts of facts, as in this case, the court should strive to maintain the *status quo* until the dispute has been resolved at trial. That should be the position in this matter.

31. For those reasons, I dismiss the Application dated 3rd June, 2020 with costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 9TH DAY OF OCTOBER, 2020

O.A. ANGOTE

JUDGE