



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA**

**ELC CASE NO. 103 OF 2004.**

**EDWARD MUNIALO MANYONGE.....PLAINTIFF**

**VERSUS**

**BENARD MUNIALO MANYONGE.....1<sup>ST</sup> DEFENDANT**

**DAVID MANYONGE MUNIALO.....2<sup>ND</sup> DEFENDANT**

**R U L I N G**

By a Judgment dated 29<sup>th</sup> November 2016, **MUKUNYA J** made the following final orders in paragraph five (5): -

*“Having listened to the evidence of the plaintiff and his witnesses and having perused all the exhibits produced in Court by the plaintiff, I am convinced that the plaintiff has proved their claim in paragraph 9 of the plaint, I order that land parcel NO NDIVISI/MUCHI/992 is registered in the name of the 1<sup>st</sup> and 2<sup>nd</sup> defendants in trust of the plaintiff in respect of 6 acres. The land shall be subdivided and 6 acres be transferred to the plaintiff. The costs of such subdivision shall be shared in prorata to the plaintiff and defendants. The 2<sup>nd</sup> defendant shall sign all the transfer documents in favour of the plaintiff failing which the Executive Officer of this Court shall sign on his behalf. The cost of the suit shall be to the plaintiff.”*

A decree followed and there is nothing to suggest that the said Judgment has been overturned on appeal.

An application by the defendants to set aside and/or vary the said Judgment was dismissed with costs vide my ruling dated 14<sup>th</sup> November 2019. Again, there is nothing to suggest that the said ruling was overturned on appeal.

I now have before me the defendant's Notice of Motion dated 28<sup>th</sup> September 2020 and anchored on the provisions of **Order 40 Rules 1, 2 and 3 of the Civil Procedure Rules** and **Sections 3, 3A and 63(1) of the Civil Procedure Act** seeking the following orders: -

**1. Spent**

**2. That a temporary injunction be issued restraining the Respondent through the DISTRICT SURVEYOR one AMOS SIMIYU from evicting the Applicants from the suit land.**

**3. The DISTRICT SURVEYOR be summoned to show cause why he has unlawfully commenced eviction of the Applicants and illegal survey.**

**4. That status quo be maintained pending the hearing and determination of the suit before WEBUYE SENIOR PRINCIPAL MAGISTRATE LAND CASE No 9 of 2018.**

**5. Costs be provided for.**

The application is founded on the grounds set out therein and is also supported by the affidavit of **DAVID MANYONGE MUNIALO** the 2<sup>nd</sup> defendant herein also dated 28<sup>th</sup> September 2020 and sworn on behalf of **BENARD MUNIALO MANYONGE** the 1<sup>st</sup> defendant herein. I should also point out that the application cites the **DISTRICT SURVEYOR** as an Interested Party.

The gist of the application is that being dissatisfied by the Judgment delivered on 29<sup>th</sup> November 2016 as well as the ruling delivered on 14<sup>th</sup> November 2019, the defendants filed a Notice of Appeal. That the plaintiff has meanwhile moved to the **WEBUYE SENIOR PRINCIPAL MAGISTRATE'S COURT** and filed **LAND CASE No 9 of 2018** (the **WEBUYE** case) seeking orders to evict the defendants yet there was no eviction order directed to the **DISTRICT SURVEYOR** to evict the defendants. That on the morning of 23<sup>rd</sup> September 2020, the

**DISTRICT SURVEYOR** started planting beacons, cutting down trees, bananas and all vegetation on the suit land. That the defendant's attempt to seek Police help was unsuccessful as they were informed that the **DISTRICT SURVEYOR** was effecting a Court order. That the said **DISTRICT SURVEYOR** is "**impartial**" (sic) and has openly showed "**bias**" and should not be allowed to act in the dispute as he has hired goons to plant illegal boundaries and demolish their homes notwithstanding the pending suit.

The application is opposed and by his replying affidavit dated 21<sup>st</sup> October 2020, **EDWARD WANYONYI SIMBILI** (the plaintiff herein) has deponed, inter alia, that the application is not only misconceived but is also bad in law and an abuse of the due process of this Court. That the Judgment delivered on 29<sup>th</sup> November 2016 has been executed and the land parcel **NO NDIVISI/MUCHI/992** closed upon sub – division to create new numbers being **NDIVISI/MUCHI/9669** and **NDIVISI MUCHI/9670**. That the plaintiff has been issued with the title deed for the parcel **NO NDIVISI/MUCHI/9670** and the boundaries thereof clearly marked on the ground but up – rooted by the defendants. A report was made to the **COUNTY SURVEYOR BUNGOMA** who restored the boundaries after which the plaintiff requested the defendants and others to vacate the land but they refused thereby prompting the plaintiff to file the **WEBUYE CASE** seeking their eviction and the case is coming up for hearing on 9<sup>th</sup> December 2020.

That the defendants have not satisfied the requirements set out in the case of **GIELLA .V. CASSMAN BROWN & CO LTD 1973 E A 358**. That nobody has attempted to demolish the defendant's homes as the exercise was supervised by the **OFFICER COMMANDING (OCS) WEBUYE POLICE STATION**.

When the application was placed before me on 30<sup>th</sup> September 2020, I directed that it be canvassed by way of written submissions. The same were subsequently filed both by **MR SICHANGI** instructed by the firm of **J. W. SICHANGI & COMPANY ADVOCATES** for the defendants and By **MR MAKALI** instructed by the firm of **J. O. MAKALI & COMPANY ADVOCATES** for the plaintiff.

I have considered the application the rival affidavits as well as the annexures thereto and the submissions by Counsel.

It is common ground that Judgment was entered for the plaintiff against the defendants herein on 29<sup>th</sup> November 2016 some four (4) years ago. That Judgment has not been overturned on appeal and an application to have it set aside or varied was dismissed on 14<sup>th</sup> November 2019. The decree has been executed and the plaintiff has annexed to his replying affidavit a copy of the title deed in respect to his land parcel **NO NDIVISI/MUCHI/9670** issued on 20<sup>th</sup> November 2017 pursuant to the decree. The plaintiff's bill of costs was fixed for taxation on 7<sup>th</sup> October 2020 but it is not clear what happened on that day. Therefore, save for the pending taxation of the plaintiff's bill of costs, this suit has been heard and determined.

Given the above circumstances, the defendant's Notice of Motion dated 28<sup>th</sup> September 2020 and which is premised on the provisions of **Order 40 Rules 1, 2, and 3 of the Civil Procedure Rules** as well as **Sections 3, 3A and 63(1) of the Civil Procedure Act** can only be a candidate for dismissal. The same is clearly predicated on quick sand and this Court must take the only available action and dismiss it without further ado. The reasons are as follows: -

Firstly, this case having been heard and finally determined following the Judgment delivered on 29<sup>th</sup> November 2016, there can be no basis upon which any order of temporary injunction can be issued. **Order 40 of the Civil Procedure Rules** is clear that an order of temporary injunction can only be issue pending "**the disposal of the suit or until further orders.**" Similarly, **Section 63(c) of the Civil Procedure Act** refers to the Court's powers to grant a "**temporary injunction.**" **BLACK'S LAW DICTIONARY 10<sup>TH</sup> EDITION** defines the term temporary injunction to mean a Preliminary injunction, interlocutory injunction, provisional injunction, injunction pendente lite as one "**issued before or during trial to prevent an irreparable injury from occurring before the Court has a chance to decide the case.**" This case having been heard, determined and even the decree executed, what irreparable injury can the defendants be seeking to prevent through a temporary injunction? The only cause of action they have is to satisfy the decree or file an appeal.

Secondly, the defendants are seeking orders against the **DISTRICT SURVEYOR** who is not even a party in these proceedings. The **DISTRICT SURVEYOR** was not part of the Judgment and subsequent decree issued by this Court. He is a stranger to these proceedings and it would amount to an abuse of the process of this Court to summon him for any purposes.

Finally, the defendants seek that this Court directs the status quo be maintained pending the hearing and determination of the **WEBUYE CASE**. Again, the term status quo is defined in **BLACK'S LAW DICTIONARY 10<sup>TH</sup> EDITION** as: -

***"The situation that existed before something else (being discussed) occurred."***

In **SHIMMERS PLAZA LTD .V. NATIONAL BANK OF KENYA LTD 2015 eKLR**, the Court of Appeal 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 ..... All it means was that everything was to remain as it was as at the time the order was given. If there was any transaction that was going on in respect of the land in question, it had to freeze and wait the discharging of the Court order."***

Ordinarily, when a Court grants an order for the maintenance of status quo in a property dispute, all it means is that pending the determination of that dispute, none of the parties shall meddle with the property. That of course can only apply when the Court is still interrogating the dispute with a view to making a final determination on the ownership thereof. Where, as in this case, that determination was made four (4) years back and there is no other issue pending the Court's consideration with regard to the property in dispute, an order for status quo would not serve any purpose. There is no suit that this Court is seized of and therefore any interlocutory order, which is basically what an order for status quo is, would be mere surplusage. Any interlocutory remedies can only be sought in the Court seized of the

**WEBUYE** case unless of course there is an appeal before this Court.

The up – shot of the above is that the defendants’ Notice of Motion dated 28<sup>th</sup> September 2020 is devoid of merit. It is accordingly dismissed with costs.

**Boaz N. Olao.**

**J U D G E**

**18<sup>th</sup> November 2020.**

**Ruling dated, signed and delivered at BUNGOMA this 18<sup>th</sup> day of November 2020. The same is delivered by way of electronic mail in keeping with the COVID – 19 pandemic guidelines.**

**Boaz N. Olao.**

**J U D G E**

**18<sup>th</sup> November 2020.**