REPUBLIC OF KENYA

IN THE SENIOR PRINCIPAL MAGISTRATE'S COURT AT MAKINDU

ENVIRONMENT AND LAND CASE NO E038 OF 2022

JOSEPH MULI MAINGI……PLAINTIFF

VERSUS

FRANCIS MUTISO MUTUNYU……1ST DEFENDANT

AGNES MUTHOKI FRANCIS……2ND DEFENDANT

MALELU MUTHOKA FRANCIS……3RD DEFENDANT

MBAAKI FRANCIS……4TH DEFENDANT

KASYOKA FRANCIS……5TH DEFENDANT

MUTUA FRANCIS……6TH DEFENDANT

LEMBI FRANCIS……7TH DEFENDANT

AMBROSE MUSYOKA FRANCIS……8TH DEFENDANT

RULING

INTRODUCTION

This ruling concerns three applications filed by the parties. The defendants filed two applications whereas the plaintiff filed one application. On 2/1/2024 the defendants filed an application dated 19/12/2023. Before the application was heard and determined, the defendants filed another application dated 12/2/2024 seeking similar orders. Subsequently, the plaintiff filed the application dated 26/2/2024 seeking, *inter alia*, orders for striking out the earlier applications that were filed by the defendants. Upon hearing the parties, the court directed that the applications be heard simultaneously. I will start with the application dated 26/2/2024. This is because, if the application succeeds, there will be no need of considering the applications filed by the defendants.

THE APPLICATION DATED 26/2/2024

In this application, the plaintiff seeks the following orders, others having been spent:

1) The Honourable court be pleased to set aside and/or discharge the orders issued on 2/1/2024 in their entirety for being worded as final orders evicting the plaintiff from the suit property;
2) The Honourable court be pleased to vary the orders issued on 15/11/2023 and in particular order 2, to remove the ambiguity in terms used therein, that are being used as title deed to the suit property by the defendants who are using them for extraneous reasons;
3) The Honourable court to issue orders of status quo on the suit property limiting the defendants to occupy, graze, cultivate and have entry to the portion measuring about 0.25 acres which they have been using, without interfering with the peaceful possession of the remaining portion of the suit property measuring 9.75 acres, by the plaintiff pending the hearing and determination of the main suit;
4) The order of injunction restraining all parties from selling, transfer, subdivision, construction, cutting down trees, harvesting soil, burning charcoal or causing any wastage whatsoever on land parcel No. Makueni/Nguu Ranch/1046 pending the hearing and determination of the main suit, to remain in force;
5) The applications dated 19/12/2023 and 12/2/2024 be struck out for being scandalous, vexatious, a delay to a fair trial of the main suit and also for being an abuse of the court process;

6) The OCS commanding Emali Police station to ensure compliance of the orders issued in this suit;
7) The costs of the application be in the cause.

The application is premised on a lot of grounds, which I do not wish to reproduce here. It is also supported by an affidavit by the plaintiff containing 57 paragraphs and annexures in support thereof.

Response by the defendants

The defendants opposed the application by filing a Replying affidavit sworn by the 2nd defendant. The replying affidavit erroneously referred to a non-existent application dated 8/4/2024, instead of the application dated 26/2/2024. The deponent deposed to facts which would otherwise amount to evidence for the main suit. The deponent further stated that the application was *Res judicata* as it seeks orders which were issued earlier and vacated. The 2nd defendant deposed that the plaintiff was asking the court to review an order issued by another court without recourse to an appeal or application for review. That the plaintiff's application was brought under the wrong provisions of law.

It was deposed that the plaintiff acting in cahoots with the OCS and police officers at Emali had disobeyed court orders. That the orders granted by the court were clear and that allegations of ambiguity are a ploy to defeat the ends of justice.

Main issues for determination

In my opinion, the main issues for determination are as follows:

i. Whether the application is *Res Judicata;*
ii. Whether the orders made on 2/1/2024 should be set aside;
iii. Whether the orders made on 15/11/2023 are ambiguous and ought to be varied;
iv. Whether the applications dated 19/12/2023 and 12/2/2024 should be struck out.

The Plaintiff's Submissions

The plaintiff filed written submissions in support of his application. The plaintiff submitted that the court granted orders on 2/1/2024 compelling the plaintiff to remove the fence around the suit property. The plaintiff argued that such an order was tantamount to issuing final orders at an interlocutory stage. That such mandatory injunctions ought to be issued in very special circumstances, yet none was exhibited by the defendants. The plaintiff relied on the authority of ***Nation Media Group & 2 others v John Harun Mwau [2014] eKLR.*** The plaintiff argued that the orders issued on 2/1/2024 had the effect of opening up the suit property to third parties and evicting the plaintiff from the suit property without giving him a chance to adduce evidence. The plaintiff relied on the authorities of ***Julius L. Marten v Caleb Arap Rotich [2021] eKLR*** and ***Tetecoh Housing and Coop Sacco Limited v Qwetu Sacco Limited [2021] eKLR.***

The plaintiff contended that the defendants obtained the orders by misrepresenting facts to the court. The plaintiff submitted that the defendants have abused the orders made on 15/11/2023 by assuming superseding rights over the land. That they have interpreted the orders of status quo to give them possessive rights over the suit property to the exclusion of the plaintiff who has been in use of the land. In essence, the plaintiff argues that the defendants have misinterpreted the orders of the court to the detriment of the plaintiff. The plaintiff relied on the authority of ***Kenya Power & Lighting Co. Limited v Sheriff Molana Habib [2018] eKLR.***

The plaintiff argued that the defendants should be limited to the portion of the suit property which they had occupied prior to filing the suit and/or at the time of the order. According to the plaintiff, the defendants are in occupation of 0.25 acres. The plaintiff argued that the applications by the defendants were scandalous as they tend to malign police officers at Emali police station. That the defendants are being overlitigious. It was argued that the defendants' applications are frivolous and vexatious. That there is no evidence of contempt and the applications are meant to irritate the plaintiff so that he gives up on his right over the suit property.

<u>The Defendants' Submissions</u>

The defendants did not file submissions to the plaintiff's application.

Analysis and determination

I have carefully considered the application, the response by the defendants as well as the submissions by the plaintiff. I have further considered the applicable law. The orders made on 2/1/2024 were made *ex parte* pursuant to the application dated 19/12/2023. The said application was premised on the allegation that the plaintiff had disobeyed the orders of the court that were made on 15/11/2023. The defendants urged the court to issue notices to the plaintiff and the OCS Emali police station to show cause why they should not be committed to civil jail for contempt of the orders made on 15/11/2023.

I have perused the orders made on 15/11/2023. The said orders were made pursuant to an application dated 6/4/2023, filed by the defendants. The court, *inter alia*, made the following orders:

a) An injunction is hereby issued restraining all parties either by themselves, their servants and/or employees from selling, transfer, subdivision and construction, cutting trees, harvesting soil, burning charcoal or causing any wastage whatsoever on plot number Makueni/Nguu Ranch/1046 pending the hearing and determination of the suit;
b) An order is hereby issued that the *status quo* on the said property in terms of the defendants/applicants who are in current occupation shall be maintained to wit that they can cultivate, graze, have entry on the suit property without breach to order (a) pending the hearing and determination of the suit.

In the application dated 19/12/2023, the defendants further made the following prayer:

"That this honourable court be pleased to issue orders directing the removal forthwith of illegal chain-link fence erected by the plaintiff around the suit property and to unblock the access road to the defendants' homestead, and the OCS Emali to supervise the same."

The defendants basically made an omnibus application based on alleged contempt of court and also sought an injunction. The defendants did not cite the provisions of law under which the application was brought as required by Order 51 rule 10 of the Civil Procedure Rules. Nonetheless, the omission was not fatal.

Order 40 rule 7 of the Civil Procedure Rules provides:

"Any order for an injunction may be discharged, or varied, or set aside by the court on application made thereto by any party dissatisfied with such order."

The order concerning the removal of the fence and unblocking of the access road is in the nature of a mandatory injunction. In the authority ***of Kenya Breweries Limited & another v Washington O. Okeyo [2002] KECA 284 (KLR)***, the Court of Appeal had this to say concerning mandatory injunctions:

"The test whether to grant a mandatory injunction or not is correctly stated in Vol. 24 Halsbury's Laws of England 4th Edn. para 948 which reads:

'A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but, in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks it ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied, or if the defendant attempted to steal a march on the plaintiff ..... a mandatory injunction will be granted on an interlocutory application'.

Also in Locabail International Finance Ltd. v. Agroexport and others [1986] 1 ALL ER 901 at pg. 901 it was stated:-

'A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances, and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant had attempted to steal a march on the plaintiff. Moreover, before granting a mandatory interlocutory injunction the court had to feel a high degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction."

In my view, courts must be more cautious when considering to grant an *ex parte* mandatory injunction. It is my further opinion that for the court to grant a mandatory injunction *ex parte*, the following conditions must be met:

1) There is extreme urgency and delay would defeat justice;
2) The applicant has an exceptionally strong case;
3) The wrongful act is clear and uncontested on the evidence;
4) The order merely restores the *status quo* rather than creating a new state of affairs;
5) The act required is simple and immediately reversible.

The impugned order was made without hearing any party. There was no tangible evidence whatsoever to show that the plaintiff had erected a fence around the suit property and had also blocked the access road. Not even photographs were furnished. It is not clear why the court found it fit to grant a mandatory injunction at that stage. In my view, the prayer could only be granted after hearing both parties and upon the court being satisfied that there were exceptional circumstances. The court already concluded that the chain-link fence was illegal even without hearing the parties. At that stage, it cannot be said that the applicants had met the threshold for granting of a mandatory injunction. The order was final as regards the allegation that the plaintiff had erected an illegal chain-link fence and blocked the access road to the defendants' home. In view of the foregoing, I am persuaded that the orders made on 2/1/2024, and in particular the mandatory injunction, were made in error.

Order number 2 in the orders made on 15/11/2023 reads as follows:

"That an order is hereby issued that the status quo on the said property in terms of the defendants/applicants who are in current occupation shall be maintained to wit that they can cultivate, graze, have entry on the suit property ……."

The record indicates that both the plaintiff and the defendants are in occupation and use of the suit land. It is however not known what acreage of the suit land is occupied by the plaintiff and what is occupied by the defendants. In my view, a *status quo* order without specifying the extent of where each party is allowed to occupy and use, would be a recipe for chaos. The order may be interpreted to mean that the defendants are free to cultivate, graze and enter upon the portion occupied by the plaintiff. I agree with the plaintiff that it would be prudent to restrict each party to the portions that they have occupied, pending the hearing and determination of the suit.

In ***Saroj K. Shah v Naran Mani Patel & 2 others [2015] KECA 753 (KLR)***, the Court of Appeal held:

"We need to state, however, that counsel for the respondents is justified in raising concerns about the issuance of generic status quo orders. An order to maintain the status quo can mean anything, everything and nothing. Unless it is clearly spelt out in precise and unambiguous terms what the status at a particular point in time is, it is a recipe for frustration and embarrassment for the court to simply order, without more, that the status quo be maintained. Such vague and imprecise orders serve only to embolden individuals so-minded to do that which is intended to be prohibited or injuncted secure that they can escape because status quo was never spelt out clearly."

In ***Bia Tosha Distributors Limited v Kenya Breweries Limited & 6 others [2023] KESC 14 (KLR),*** the Supreme Court observed thus:

"At this juncture, we need to caution that courts should be careful when issuing conservatory and other interim relief to parties. In particular, while it is well intended to preserve the substratum of the case by way of status quo orders, sight should never be lost of the fact that parties appearing before courts for such urgent relief are always at the height of their contest. If indeed the courts must use the term status quo, it is only practical that the same be accompanied by the descriptive particulars of the exact position that the court seeks to preserve. This will avoid situations like the present one where each party is left to its own perception as to what the court meant. This ultimately erodes the very essence of court intervention and subjects the court to undesirable controversy regarding compliance with the said order."

Whereas the orders made on 15/11/2023 indicated that the defendants would remain in occupation of the suit land and continue to cultivate, graze and have entry on the suit property, it was not clear whether it applied to the whole land or the portion occupied by them. The orders could also be interpreted to mean that the plaintiff was not allowed to occupy and use the land. Without evidence of what portion was occupied by either parties, it would be difficult to ascertain the status quo. In the circumstances, I agree that there is

need to vary the orders. However, this will require evidence of the true picture on the ground.

Having found that the orders made on 2/1/2024 and part of the orders made on 15/11/2023 are problematic, my view is that it would be imprudent to proceed with the applications dated 19/12/2023 and 12/2/2024. I will not strike out the applications as suggested by the plaintiff but will mark them as spent.

DISPOSITION

In view of the foregoing, I make the following orders:

a) The orders made on 2/1/2024 pursuant to the application dated 19/12/2023 are hereby set aside;
b) The orders made on 15/11/2023 and in particular order No. 2 on the *status quo* are hereby stayed pending determination of the real *status quo* on the ground;
c) For avoidance of doubt, the order of injunction restraining all the parties either by themselves or through their servants and or employees from selling, transferring, sub-dividing, constructing, cutting down trees, harvesting sand or soil, burning charcoal or causing wastage whatsoever on land parcel No. Makueni/Nguu Ranch/1046 pending the hearing and determination of the suit shall remain in force;
d) The Makueni County Surveyor is hereby directed to visit the land and ascertain the acreage of the portions occupied by the plaintiff on one hand and the defendants on the other hand and furnish his report in court;
e) The parties through their counsel, to agree with the County Surveyor on when to visit the land for the exercise. However, the exercise should be conducted not later than forty-five (45) days from today;
f) The parties shall equally meet the costs of the exercise;
g) In the meantime, the applications dated 19/12/2023 and 12/2/2024 are hereby marked as spent;
h) There shall be no orders as to costs;
i) Parties are advised to avoid side shows and focus on the hearing and determination of the main suit.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MAKINDU THIS 13TH DAY OF MARCH, 2026.

Y.A SHIKANDA

SENIOR PRINCIPAL MAGISTRATE.