



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

THIKA LAW COURTS

ELC CASE NO.771 OF 2017

CHRISTOPHER KANAI KAMU.....1ST PLAINTIFF/RESPONDENT

PETER MWANGI MBUGU.....2ND PLAINTIFF/RESPONDENT

MICHAEL MWAURA KORI.....3RD PLAINTIFF/RESPONDENT

STEPHEN KIMANI KAMAU.....4TH PLAINTIFF/RESPONDENT

KAMITI ANMER DEVELOPMENT ASSOCIATION

(Suing through its Office Bearers of

JOSEPH KINYANJUI MACHARIA, JOSEPH KIMANI

KARANJA & ERICK GITHAIGA MWANGI) ...5TH PLAINTIFF/RESPONDENT

-VERSUS-

KENYA FOREST SERVICES.....1ST DEFENDANT/APPLICANT

KAMITI FOREST SQUATTERS ASSOCIATION

(Sued through its Chairman Office Bearers PETER

NJOROGE WAKABA, GEORGE KABIRU

& ALICE W. NGUGI.....2ND DEFENDANT/RESPONDENT

MUUNGANO WA KAMITI SOCIETY

(Sued through its Office Bearers IRINE

NANDUPOI GITA, THOMAS MOTURI &

BENSON NGUGI MUIRURI.....3RD DEFENDANT/RESPONDENT

KAMITI ANMER SQUATTERS WELFARE

GROUP(Sued through its Office Bearers

KINUTHIA MWANGI.....4TH DEFENDANT/RESPONDENT

AND

RULING

The 1st – 4th Plaintiffs herein filed this suit on **4th October 2017**, and alleged that they are the registered owners of various parcels of land which were legally excised and registered in their respective names in **1995** from land parcel **No.Kamiti/Anmer/8390**, and which was also known as **Kamiti Forest Reserve**. Each of the Plaintiff attached a copy of the title deed in respect of their specific parcel of land and sought for declaration that they are the individual and separate registered owner of **LR.Kamiti/Anmer Block 2/162, Block 2/1208, Block 2/985 and Block 2/493**. Further they sought for orders prohibiting the 1st Defendant (**Kenya Forest Service**) from blocking access and occupation of the above mentioned parcels of land by the Plaintiffs and/or their agents.

Simultaneously, the Plaintiffs also filed a **Notice of Motion** application dated **3rd October 2017**, and sought for injunctive orders against the 1st Defendant (**Kenya Forest Service**) prohibiting it from denying the Plaintiffs access to their respective parcels of land. The matter came to court under **Certificate of Urgency** on **4th October 2017**, and after considering the said **Notice of Motion**, the Court did allow **prayer No.2** of the said **Notice of Motion** on temporary basis. The orders issued were:-

1) That an order be and is hereby issued against the Defendant, its agents/employees or anybody claiming authority from it, prohibiting them or the Defendants from denying the Plaintiffs/Applicants and their employees access and or occupation of LR.No.Kamiti/Anmer Block 2/162, LR.No.Kamiti/ Anmer Block 2/1208, LR.No.Kamiti/Anmer Block 2/985 and LR.No.Kamiti/Anmer Block 2/493 until this application is heard interparties.

The above interim injunctive orders were extended from time to time.

The application was opposed by the said **Kenya Forest Service** (1st Defendant) and subsequently various parties sought to be enjoined in the proceedings. Consequently, the Court did allow **joinder** of various parties on **11th December 2017** and directed **Mr. Wahome Advocate** for the Plaintiffs to amend the **Plaint**.

The **Amended *Plaint*** was filed on **20th December 2017**, and all the **enjoined parties** were included. Parties have thereafter filed several other interlocutory applications.

The hearing of the initial interlocutory application for injunction was slotted for **21st February 2018**. However on **21st February 2018**, the advocates who were present being **Mr. Wahome** for the 1st – 4th Plaintiffs, **M/S Maina** holding brief for **Mr. Gikonyo** for the 5th Plaintiff, **Mr. Mari** for 3rd Defendant, **Mr. Tumu** holding brief for **Mr. Njuguna** for 4th Defendant, **Mr. Angima** for 2nd Defendant and **M/S Masinde** for **National Land Commission-Interested Party**, agreed to dispense with all the pending interlocutory applications so that the matter can be prepared for hearing of the main suit.

The above advocates further agreed to maintain the *status quo* and with the agreement of the Court, *status quo* order prevailing was ordered to be maintained and the *status quo* meant that each party was to occupy and continue occupation of the current portions they occupy without interference. Further, the **Kenya Forest Service** (3rd Defendant) was not to interfere with the parties possession of their land portions with no new occupation and no construction of permanent structures on the suit property. The parties were also directed to file whatever pleadings they were to file and then set matter down for hearing of the main suit.

It is the above orders of the Court that were recorded with the Consent of the advocates present that aggrieved the Defendant herein who then filed a **Notice of Motion** application dated **22nd February 2018**, brought under **Order 40 Rule 7** of the **Civil Procedure Rules 2010** and **Sections 1A, 1B** and **3A** of the **Civil Procedure Act**. The 1st Defendant/Applicant sought for the following orders:-

a) That this Court be pleased to Stay the Consent Orders made on 21st February 2018, pending the hearing and determination of the application herein.

b) That this Court be pleased to set aside the proceedings and the Consent Orders made on 21st February 2018.

c) That the costs of this application be provided for.

The 1st Defendant alleged that the **Consent Orders** were entered in the absence of their advocate and the said **status quo Order** would greatly prejudice it as the orders would interfere with the Statutory mandate of the 1st Defendant in carrying out its duties.

The **Ruling** herein is therefore in respect of the above stated application which was vehemently opposed by the Plaintiffs and the other Defendants.

The Respondents filed various **Grounds of Opposition** and also averred that the alleged prejudice that the 1st Defendant/Applicant would stand to suffer cannot be compared with the prejudice that would be suffered by all the other parties who were present on **21st February 2018**.

It was further averred that the entire application is **misconceived scandalous, vexatious, frivolous** and an abuse of the court process. That the 1st Defendant did not demonstrate the prejudice that it would suffer due to the existence of the **Consent Orders** in force should the matter

proceed to full trial. It was further averred that the 1st Defendant would suffer no prejudice as there has been in existence restraining orders from **October 2017**.

The Court directed the parties to canvass the instant **Notice of Motion** by way of **written submissions** and the said directives were complied with and parties filed their respective written submissions.

The Court has now carefully read and considered all the rival written submissions. The Court has also considered the pleadings in general and the relevant provisions of law.

Indeed the 1st Defendant/Applicant has sought for **setting aside** of the **proceedings** and **Consent Orders** of **21st February 2018**. The Applicant based its application on **Order 40 Rule 7** of the **Civil Procedure Rules**, which states:-

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

It is trite that the above Section of law applies when an order of injunction has been issued by the Court and the dissatisfied party then applies for setting aside, varying or discharge of the said injunction.

From the Court record, what the Court issued on **21st February 2018**, was maintenance of the existing *status quo*. There was already in force an **Order of Injunction** issued on **4th October 2017**, restraining the 1st Defendant from interfering with the 1st – 4th Plaintiffs’ occupation and dealing with their respective parcels of land which were subdivisions of **Kamiti/Anmer/8390**. The 1st – 4th Plaintiffs had attached copies of their title deeds. However the 5th Plaintiff and 3rd – 4th Defendants have alleged that they have been in occupation of the suit property.

Therefore, since the orders issued by the Court on **21st February 2018** were on *status quo* and **not** injunctive orders, then the Court finds that **Order 40 Rule 7** was **not applicable**. See the case of **Saifudeen Abdulahi & 4 Others, Mombasa HCC Misc. Cause No.11 of 2012**, where the Court held that:-

“In my view, an order of *status quo* to be maintained is different from an order of injunction both in terms of the principles of grant and the practical effect of each, while the latter is a substantive equitable remedy granted upon establishment of a right or at interlocutory stage, a *prima-facie* case among other principles to be considered, the former is simply an ancillary order for the preservation of the situation as it exists in relation to pending proceedings before the hearing and determination thereof. It does not depend on proof of right or *prima-facie* case.....An order of *status quo* merely leaves the situations or things as they stand pending the hearing of the reference or complaint.”

Equally, in this case, the order of *status quo* just left the situation as it was since there was an injunctive order before pending the hearing and determination of the main suit. The 1st Defendant/Applicant cannot allude that *the status quo* order herein has drastically changed the situation on the ground to its disadvantage or prejudice.

However, the application is also anchored under **Sections 1A, 1B** and **3A** of the **Civil Procedure Act**. **Sections 1A** and **1B** deal with the overriding objective of the **Civil Procedure Act**, which is to facilitate the **just, proportionate** and **expeditious** disposal of civil disputes before the court.

Further **Section 3A** of the same Act donates power to court to issue orders that are necessary in ensuring end of justice is met and also to prevent abuse of the court process. The Court finds the above provisions of law relevant herein.

The 1st Defendant/Applicant applies for **setting aside** of the **Consent Orders** that were issued by the Court on **21st February 2018** on the ground that they were issued in the absence of the 1st Defendant’s advocate and that the said orders are prejudicial to the 1st Defendant as it cannot discharge its Statutory duties as mandated by the relevant laws. However, the Court finds that the Orders as issued on **21st February 2018** were in line with the overriding objective of the **Civil Procedure Act** as stated in **Sections 1A** and **1B**. The Court has a duty to ensure that matters before it are decided in an expeditious manner. There was already in existence injunctive orders against the 1st Defendant. The 1st – 4th Plaintiff have attached title deeds in respect of their parcels of land. The said title deeds have not been revoked by any court of law. There is a dispute as to whether these parcels of land are rightfully held by the 1st – 4th Plaintiffs and also whether the 5th Plaintiff, 3rd-4th Defendants are rightfully occupying the suit property. The 1st Defendant/Applicant cannot be heard to claim that it has been prevented from discharging its Statutory mandate as provided in law when there is in existence injunctive orders against its dealing with the suit property. The Court therefore finds that there will be no prejudice occasioned to the 1st Defendant by the existence of the Orders of *status quo* which orders were issued in the absence of its Advocate. No sufficient explanation was given for his absence given that the date was taken in the presence of the advocate who was holding brief for **Mr. Macharia** for the 1st Defendant.

Further, **Section 3A** of the **Civil Procedure Act** is very clear that the court has powers to make such necessary orders that would ensure end of justice is met and to prevent abuse of the court process. There is a dispute herein as to whether the 1st Defendant/Applicant is entitled to interfere with the 1st - 4th Plaintiffs’ ownership of their respective parcels of land wherein they each hold their individual title deed. There is also a dispute as to whether the 5th Plaintiff, 3rd – 4th Defendants are entitled to occupy the suit property. That dispute can only be resolved by calling of evidence in the main trial. The **Consent Order** of **21st February 2018**, unlocked this suit from the many pending interlocutory applications and opened the matter for hearing of the main suit. Therefore the Court finds that the necessary order herein in ensuring that end of justice is met is to decline to allow the orders sought.

Further, the Court finds that the application is an abuse of the court process given that there existed an **Injunctive Order** and the **Consent Order** of **status quo** issued on **21st February 2018**, was not any different from the restraining orders that were in force before **21st February 2018**. See the case of **Cosmas Safari Chula & 134 Others...Vs...Bryan Daniel Mc Cleary & Another HCCC No.97 of 2010 eKLR**, where The Court held that:-

“Setting aside is a discretion of the Court which can only be exercised where reasonable cause is shown.....No ground has been shown and therefore I find no reason to set aside those orders.”

Further, the Court finds that under **Environment and Land Court Practice Directions and Rules** contained in the **Kenya Gazette** of **28th July 2014**, the Court under **Rule 32** can impose an order of **status quo** where the parties fail to agree on the same. Indeed the Court had encouraged the parties to agree on **status quo** order so that the main suit can be set down for hearing.

For the above reasons, the Court finds that the **Consent Order** on **status quo** issued by the Court on **21st February 2018**, was in line with **Environment and Land Court Practice Directions and Rules** in force and specifically **Rule No.32**. The Court finds no reasons to set aside the said orders of **21st February 2018**.

Infact, the **1st Defendant** should be in the forefront in striving to have the matter heard expeditiously so that in the event the Plaintiffs and other Defendants are found to be trespassers, then necessary orders would be issued to the benefit of the **1st Defendant/Applicant**. The **1st Defendant** cannot be heard to talk about carrying its Statutory mandate on the suit property when there is an existing dispute over its dealing with the suit property and especially when the **1st-4th Plaintiffs** have title deeds which have not been **revoked, cancelled** or declared to have been acquired **fraudulently** or **unprocedurally** by any court of law.

Having now carefully considered the **Notice of Motion** application dated **22nd February 2018**, the **Court finds it not merited and it is accordingly dismissed entirely with costs being in the cause**.

Further, the Court finds that there are in existence other matters pending in **Milimani Environment and Land Court** over the suit properties herein and involving the same parties. There is need to take directions on the hearing of all these matters in one forum to prevent conflict of decisions and which conflict might bring judicial embarrassment.

It is so ordered.

Dated, Signed and Delivered at Thika this 6th day of July 2018.

L. GACHERU

JUDGE

In the presence of

No appearance for **1st – 4th Plaintiffs/Respondents**

M/S Njoki holding brief for Mr. Gikonyo for **5th Plaintiff/Respondent**

Mr. Cheruget holding brief for Mr. Macharia for **1st Defendant/Applicant**

No appearance for **2nd Defendant/Respondent**

No appearance for **3rd Defendant/Respondent**

No appearance for **4th Defendant/Respondent**

No appearance for Interested Party

Lucy – Court clerk

L. GACHERU

JUDGE

Court – Ruling read in open court in the presence of the above stated advocates.

L. GACHERU

JUDGE