



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC. CASE NO. 434 OF 2017

WEST END BUTCHERY LIMITED.....PLAINTIFF/APPLICANT

VERSUS

BENEDICT MUIMI MUNGITHYA....1ST DEFENDANT/RESPONDENT

MUSABAKI COMPANY LIMITED...2ND DEFENDANT/RESPONDENT

FLORENCE AKOTH ODHIAMBO.....1ST INTERESTED PARTY

LAINA KATIKA MORAKIA.....2ND INTERESTED PARTY

BONIFACE KIIO MUTUNE.....3RD INTERESTED PARTY

JONES MWANZIA MUTUNE.....4TH INTERESTED PARTY

PATRICK OKOTH.....5TH INTERESTED PARTY

CONSOLATA MBOYA.....6TH INTERESTED PARTY

MBULA NGUKU WAEMA.....7TH INTERESTED PARTY

RULING

1. In the Notice of Motion dated 18th September, 2018, the Plaintiff is seeking for the following orders:

a. That this Honourable Court be pleased to find that the Respondents, by themselves or through their agents, purchasers, servants, assignees, representatives or persons purporting to derive title from them are in contempt of this court by proceeding to engage in acts of construction, sub-division, alienation and general dealing with the suit property in contravention of the orders given on the 27th July, 2018.

b. That this Honourable Court not only orders the said developments done in blatant contempt of the orders of this court to be pulled down but also gives orders that will ensure that the Plaintiff is allowed to put persons on the suit property who will ensure that there is no encroachment by persons taking advantage of the lacuna and uncertainty created by the orders of 27th July, 2018.

c. That this court does direct the OCS Mlolongo Police Station to oversee compliance of the above orders.

d. That this court be pleased to award costs of this Application to the Applicant.

2. The Application is supported by the Affidavit of the Plaintiff's Director and shareholder who has deponed that the Plaintiff is the registered proprietor of Land Reference number 7149/10 and all the sub-divisions thereto; that by a Ruling dated 27th July, 2018, this court ordered for the preservation of the status quo and that the court defined the said order of status quo.

3. According to the Plaintiff's Director's depositions, he came to learn that despite the orders of status quo, there are ongoing constructions,

dealings and sub-divisions on the suit land; that the said constructions, dealings and sub-divisions appear to have been ongoing after the orders of 27th July, 2018 and that the acts of aggression by the Respondents are a calculated move to ensure total occupation and subjugation of the Applicant's property which is the subject of the suit with a view of defeating the Applicant's claim.

4. The 2nd Respondent's Managing Director deponed that the allegations by the Plaintiff that there are ongoing constructions, dealings and sub-divisions on the suit property after the orders of the court of 27th July, 2018 are false; that the 2nd Respondent has fully complied with the orders of the court and that no evidence has been adduced to prove the allegations of contempt.

5. The 2nd Respondent's Director finally deponed that none of the photographs produced by the Applicant show any construction taking place since none of them depict any workers on site, neither do they prove any act of sub-division of the land. According to the 2nd Respondent's Managing Director, the allegations in the Plaintiff's Application are made in bad faith and that the Application is an attempt by the Plaintiff to station goons on the suit land with the intention of causing havoc and breach of peace by introduction none-residents on the suit land.

6. The 3rd Interested Party deponed that there have been no ongoing construction, dealings and sub-division of the suit land after the orders of 27th July, 2018; that the Plaintiff is using the current Application as an avenue to enter the suit land knowing very well that the Interested Parties are occupying the said land with their families and that the photographs annexed on the Plaintiff's Supporting Affidavit are old photographs.

7. The Plaintiff's advocate submitted that they have attached pictures of the ongoing construction on the suit land; that the structures that were on the suit land when the court visited the *locus quo* were incomplete and that after this court gave the orders of status quo, the Respondents have since put windows, doors and gates on some of the structures in disobedience of the orders of the court.

8. The 2nd Defendant's counsel submitted that the 2nd Defendant is the one who did the finishing of the structures on the suit land between December, 2017 and January, 2018 and when there was no order barring the 2nd Defendant from dealing with the suit land and that since the order was given, no construction has been going on the suit land.

9. The record shows that on 27th July, 2018, this court made the following orders:

“That the prevailing status quo in respect of L.R. No. 7149/10 (I.R No. 30601) be maintained pending the hearing and determination of this suit, meaning that neither the Plaintiff nor the Defendants and the Interested Parties, or any other person acting under their instructions should sub-divide, sell, alienate, develop or deal with the suit property in a manner that is likely to change the status of the land pending the hearing and determination of the suit.”

10. On the same day that the above order was made, the 2nd Defendant was enjoined in this suit. Prior to the Ruling of 27th July, 2018, the 2nd Defendant was not a party to the suit.

11. Before the court delivered the Ruling of 27th July, 2018, the court had visited the *locus quo* on 16th January, 2018 where it noted the presence of temporary structures on the land. Indeed, all the permanent structures on the land had not been completed.

12. In the Application dated 14th February, 2018 for joinder, the 2nd Defendant informed the court that it is the one which had built the unfinished stone walled bungalows on the suit land and that it only came to learn about the visit by the court on the suit land much later. Of course, as I have stated above, it was not until 27th July, 2018 that the 2nd Defendant was enjoined in the suit and was restrained from continuing with the construction of houses on the suit land.

13. Although the court had issued the orders of status quo on 22nd February, 2018, it was not until 27th July, 2018 that the 2nd Respondent, which had admitted that it was the one that was constructing the permanent structures on the land, was enjoined from further developing the suit land. The photographs annexed on the Plaintiff's Managing Director's Affidavit do not show if indeed the structures were completed after the order of 27th July, 2018 or between the time the court visited the site until 27th July, 2018.

14. If indeed the shown structures were completed by the 2nd Defendant before 27th July, 2018, the 2nd Defendant cannot be punished for that because it was neither aware of the order of status quo nor a party to the suit.

15. Having failed to show the precise period that the structures on the suit land were completed, I cannot find that the 2nd Respondent, or the Interested Parties, are in contempt of the orders of 27th July, 2018. I also decline to grant orders allowing the Plaintiff to put its agents on the suit land *“who will ensure that there is no encroachment by persons taking advantage of the lacuna and uncertainty created by the orders of 27th July, 2018.”*

16. Indeed such an order will not only create chaos on the suit land, but will negate the very orders that this court made of 27th July, 2018. Consequently, the Application by the Plaintiff dated 18th September, 2018 is dismissed but with no order as to costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 23RD DAY OF NOVEMBER, 2018.

O.A. ANGOTE

JUDGE