



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT

AT MALINDI

ELC 232 OF 2014 (OS)

**IN THE MATTER OF: LAND PARCEL NOS. 337/III/MN (CR. 8964), 46/III/MN, 1881/III/MN,
1882/III/MN AND 1883/III/MN**

**IN THE MATTER OF: AN APPLICATION FOR DECLARATION THAT THE PLAINTIFFS
HAVE OBTAINED OWNERSHIP OF 20 HECTARES OF THE ABOVE PARCELS OF LAND
BY WAY OF ADVERSE POSSESSION.**

BETWEEN

1. MTSONGA KABILA CHIRO
2. KHAMIS MOHAMMED
3. EMMANUEL FADHILI JEFWA
4. MASHA MRAMBA MASHA
5. ESTHER TSORAMBA TRULU(all suing on behalf of themselves
and other members of Barani Pole Pole Self Help Group).....**PLAINTIFFS**

=VERSUS=

1. KAMIMI COMPANY(1976).....**1ST DEFENDANT**
2. MTWAPA HOLDINGS LIMITED.....**2ND DEFENDANT**
3. KABIBI HOLDINGS LIMITED.....**3RD DEFENDANT**
4. AYEM INVESTMENTS LIMITED.....**4TH DEFENDANT**
5. BALJABER LIMITED.....**5TH DEFENDANT/APPLICANT**

RULING

1. I have before me a Notice of Motion Application dated 6th February 2017. The 5th Defendant/Applicant is praying for orders:-

1.

2.

3. THAT (a) temporary injunction be issued against the Plaintiffs, their families, agents and/or anyone acting on their instructions or otherwise from any further dealings, construction, wastage or alienation of the 5th defendant's property known as Plot No. 1883/III/MN pending the determination of this suit.

4. That the Honourable Court do conduct a site visit on Plot No. 1883/III/MN pending the hearing and determination of this application.

5. THAT the OCS Mtwapa to ensure compliance of the Order.

6. THAT the cost of this application be provided for.

2. The application is supported by the annexed affidavit of Swaleh A. Bajaber, a Director of the 5th Defendant sworn on 6th February 2017. It is premised on a number of grounds listed on the body thereof as follows:-

(a) That the 5th Defendant is the registered proprietor of the Plot Known as 1883/III/MN situate in Mtwapa, Kilifi County;

(b) The Plaintiffs on 11th December 2014 filed this Originating Summons and obtained injunctive orders against the defendants from interfering with the Plaintiff's alleged occupation of the Defendants properties outlined in the Summons;

(c) Thereafter the parties consented to having the status prevailing be maintained pending the hearing of the suit; and

(d) That unfortunately, while the matter is still pending, the Plaintiffs started constructing permanent houses and clearing part of the 5th Defendant's property with a view to defeating the 5th Defendants claim and causing wastage and alienation of the 5th Defendant's property.

3. The Plaintiffs are opposed to the application. In a Replying Affidavit sworn on their behalf by Khamis Mohamed, the 2nd Plaintiff/Respondent on 6th March 2017, the Plaintiffs deny that they have encroached on the suit property in the manner stated by the 5th Defendant. On the contrary, they state that it is the 5th Defendant who ferried away building materials including cement which they were using in constructing a perimeter wall on the suit property.

4. It is the Plaintiffs/Respondents case that the 5th Defendant has been reporting alleged illegal developments to the suit properties out of malice and they are agreeable to the Court visiting the disputed properties to ascertain the position obtaining on the ground.

5. I have looked at the application before me and the Affidavit in Reply. I have also considered submissions placed before me by the 5th Defendant/Applicant. I did not see any submissions by the Plaintiffs/Respondents although either side had indicated they had filed submissions at the time of the hearing of this application.

6. From the record, it is apparent that the Originating Summons herein was filed way back on 11th December 2014 against the 1st to 4th Defendants. Filed together with the Summons was an application brought under Certificate of Urgency dated 11th December 2014. On or about 15th December 2014, having heard the application in chambers ex-parte, the Honourble Justice Chitembwe then seized of the matter granted orders as follows:-

1. *That the application is hereby certified as urgent.*

2. *That in the interim, temporary orders of injunction are hereby issued restraining the Defendants by themselves, servants, workmen and/or agents, or otherwise however from removing/destroying houses/structures erecting fences, threatening the plaintiffs with harm and eviction, trespassing onto and/or in any other way dealing with the plaintiffs property known as Plot Nos. 337/III/MN (CR 8964), 464/III/MN, 1881/III/MN, 1882/III/MN and 1883/III/MN situated at Barani Kikambala Division within Kilifi District and to stop interfering in any other way with the plaintiffs' occupation and peaceful enjoyment of the suit property till 29th December 2014.*

3. *That the matter be mentioned on the 29th day of December 2014 before the Duty Judge."*

7. On 29th December 2014, the file was placed before the Honourable Lady Justice Mary Kasango who directed again in the absence of the Defendants (who had apparently not yet filed appearance) that the Status quo be maintained pending the hearing of the matter inter-partes

8. On the said 29th December 2014, the present 5th Defendant, Bajaber Limited filed an application seeking to be enjoined as an interested party on the basis that even though it had not been sued, the injunction orders of 15th December 2014 affected land parcel No. 1883/SEC III/MN of which it was the registered proprietor.

9. On the same day, the present 5th Defendant filed a separate application dated 26th December 2014 seeking inter alia, orders to set aside, vary and/or discharge the order of temporary injunction issued on 15th December 2014 in as far as they relate to the property known as 1883/III/MN pending the hearing of the application and the suit.

10. On the 30th December 2014, the application by the 5th Defendant seeking a variation of the orders issued on 15th December 2014 was again placed before Justice Kasango who directed that it be adjourned to 6/1/2015 for mention before the Honourable Justice Chitembwe who had issued the orders. It would however appear that the Court never sat on the said 6/1/2015 but thereafter the parties continued extending the orders of status quo by consent in subsequent appearances in Court from time to time, to-date.

11. It is now the 5th Defendant's case that the said Orders of Status quo have been taken advantage of by the plaintiffs who have since engaged in putting up of new permanent structures on the suitland.

12. Black's Law Dictionary 8th Edition describes 'status quo' as a Latin Word which means "the situation as it exists". Arising from that description, an order of status quo can only mean an order for the preservation of the situation as it exists in relation to pending proceedings before the hearing and determination thereof. Such an order in my view leaves the situation or things as they stand pending the hearing of the reference or complaint.

13. Be that as it may, the Order as was recorded subsequently had the endorsement of both parties. As the Applicants themselves have put it, the status quo order was consented to by both parties. The law pertaining to setting aside of consent orders has been clearly stated. A Court of law will not interfere with a consent Judgment or order except in circumstances such as would provide a good ground for varying or rescinding a contract between the parties. To impeach such an order, it must be shown that it was obtained by fraud, or collusion or by an agreement contrary to the policy of the Court.

14. The Applicant before me is not seeking to set aside the order of status quo. Instead, they are seeking that an injunction order be issued against the plaintiffs. That would lead to a situation where there are two Court orders issued pertaining to the same parcel of land. That is not desirable in a situation like this as it will only continue to promote anarchy.

15. Arising from the foregoing, I am unable to grant the orders sought herein. I dismiss the application dated 6/2/2017 accordingly. The parties are however directed to maintain the status quo in strict compliance with the orders issued earlier by this Court.

16. Each party to bear their own costs.

Dated, signed and delivered at Malindi this 19th day of September, 2017.

J.O. OLOLA

JUDGE