



**Karega & 17 others v Nthautho; Mutokaa & another (Interested Parties) (As the Legal Representatives of the Estate of Mutokaa Nthautho -Deceased) (Environment and Land Appeal 104 of 2014) [2024] KEELC 1153 (KLR) (20 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 1153 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT EMBU  
ENVIRONMENT AND LAND APPEAL 104 OF 2014  
A KANIARU, J  
FEBRUARY 20, 2024**

**BETWEEN**

**ROBERT NJERU KAREGA & 17 OTHERS ..... APPLICANT**

**AND**

**MUTOKAA NTHAUTHO ..... RESPONDENT**

**AND**

**VIRGINIA NGUNYI MUTOKAA ..... INTERESTED PARTY**

**JAMES NJUE MUTOKAA ..... INTERESTED PARTY**

**AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF MUTOKAA  
NTHAUTHO -DECEASED**

**RULING**

1. This ruling is essentially a determination of a Notice of Motion dated 21.02.2023 and filed on 22.02.2023 brought under a Certificate of Urgency. It is expressed to be brought under Sections 1A, 1B and 3A of the *Civil Procedure Act*, order 40 rule 1 of the *Civil Procedure Rules* and articles 40 & 50 of the *Constitution of Kenya*. The applicants – Robert Njeru Karega & 17 others – are the Plaintiffs in the suit while the respondents – Virginia Ngunyi Mutokaa and James Njue Mutokaa – are seeking to be defendants on behalf of the estate of the deceased original defendant – Mutokaa Nthautho. The applicants seek, inter alia, an order of preservation of status quo. More specifically, the prayers sought are as follows;

1. Spent
2. Spent



3. That pending the hearing and determination of the Plaintiff's application dated the 7<sup>th</sup> of November 2022, this Honourable court be pleased to issue an order for the preservation of status quo in respect of land reference L.R No. Mbeti/Gachuriri/249.
4. That the costs of this application be provided for.
2. The motion, or application if you like, is premised on the grounds on the face of it as well as the supporting affidavit sworn by the 7<sup>th</sup> Applicant - John Mwaniki Ngunyi - on February 21, 2023 on his own behalf and on behalf of the other applicants. He deposed, *inter alia*; that on November 7, 2022 they filed an application seeking to extend the time for substitution of the Defendant, who is deceased, with his representatives and revive the abated suit. That despite serving the application on the personal representatives of the deceased defendant, and the court giving directions that the responses be filed and the timelines within which to do so, they have failed to file a response to the application. That the matter has been mentioned severally in court but because the Respondents are yet to comply with the courts directions, the court has not issued further directions on the hearing of the said application.
3. He deposed further that succession proceedings in respect to the estate of the deceased have been going on concurrently in succession cause No. 47 of 2019 before the Principal Magistrates Court at Siakago. That they have now learnt that the personal representatives of the estate of the deceased have filed an application in the said succession proceedings seeking to be allowed to transit/transfer and/or subdivide among the beneficiaries the property in dispute herein. That they are therefore apprehensive that if the same is allowed to take place, their suit herein as well as their application dated November 7, 2022 will be rendered superfluous. They attach a copy of the said application by the personal representatives.
4. They urge that it is in the interest of justice for the preservation of the status quo of the subject matter of this suit, being LR No. Mbeti/Gachuriri/249. That if the orders sought do not issue the representatives of the deceased will proceed to subdivide the suit land among the beneficiaries which will render the suit herein moot. The applicants said they will be unfairly denied their day in court to air out their grievances.
5. The application was opposed by the Respondents vide a replying affidavit sworn on May 17, 2023 by James Njue Mutokaa. He deposed that the application is defective, scandalous, incompetent, bad in law, frivolous and an abuse of the court process. That the suit herein abated and thus the court is functus officio. That the issue of their alleged proprietary interest has already been heard and determined with finality in various courts. That the same is not tenable as it violates the principles of res judicata and sub judice and thus is an abuse of the court process. That the instant application is similar to the application dated November 28, 2022 filed before the Siakago Magistrates court hence an abuse of the court process. That the same is aimed at delaying and frustrating the administration of the estate of the deceased.
6. It was agreed that the application be disposed of by way of written submissions. The Applicants filed their submissions on 02.05.2023. They first gave a background to the application. They then submitted that the Applicants, being members and representatives of the Mbandi Clan, are claiming proprietary rights to the suit property in the substantive suit herein. However, their suit abated as they did not make an application for the substitution of the deceased defendant with his legal representatives within time and that they have now filed an application for substitution. That if the aforesaid application is successful, then they would have been granted their day in court to prosecute their claim and demonstrate on merit as to why they believe the suit property belongs to the Mbandi Clan and not only to the deceased defendant.



7. They submitted further that the case of *Fatuma Abdi Jillo v Kuro Lengesen & another* (2021) eKLR analyzed the nature of a status quo order, what its intended objective is, and under what circumstances the same should be granted. That status quo orders are for the preservation of the prevailing circumstances as they exist at the time of making the order in respect of the suit property. They are said to be different from injunction orders. That they are not normally premised on such grounds as the establishment of a prima facie case. That they should be issued to preserve the subject matter of the suit to ensure that no party is prejudiced by any malicious conduct of the other while their dispute is pending determination. They cited the case of *Pricillah Wanja Kibui v James Kiongo Kibui & another* (2014) eKLR to support that position.
8. They submitted further that the only concern of the court in considering whether or not to grant status quo orders, is to do justice by ensuring that the substratum of the suit is maintained and preserved. That over time courts have established that in land matters, it is better to always lean on issuing status quo orders to ensure that the property is preserved until the issues in dispute are determined. They cited the cases of *Elly Jepkoech Limo v Susan Wangoi Kibe & another* (2020) eKLR and *Joel Kipkurui Arap Koech v Alice Wambui Magansu & 3 others, Ngugi Nthukire & 3 others v Joseph Mbugi Ngari & 6 others* (2019) eKLR to support this position.
9. They averred that they do not see any prejudice that the Respondents will suffer if the orders are issued as the same would mean that if they are in occupation of the suit property, they would continue being in occupation until the Applicants application for the revival of the suit is determined. The only activities being restrained are any subsequent dispositions which might have the effect of prematurely and mischievously defeating the plaintiff's suit. That the Applicants stand to suffer irreparable harm if the orders are not issued as nothing prevents the Respondents who have the certificate of grant from dealing with the suit lands in a manner that may defeat the Applicants claim. That the Respondents claim that they have withdrawn the application before the succession court cannot hold since the application even if withdrawn goes to show that the Respondents have always intended to dispose of the suit property. They urge that their application be allowed.
10. The Respondents filed two set of submissions. The first set was filed on 23.06.2023. They submitted that the application before the court is similar to an application dated November 28, 2022 filed in Siakago Succession Cause No. 47 of 2019 which offends the provisions of Section 6 of the *Civil Procedure Act*. That there is no justification for having two applications being heard parallel to each other and thus there is no justification to sustain/entertain the instant application. Hence there is lack of jurisdiction. That the suit herein abated and the Applicants sought to revive the same through an application dated 15.02.2021, which application was dismissed for want of merit. That having rendered its ruling on the application to revive the suit, the court was rendered functus officio and on that account it lacks the jurisdiction to entertain the instant application as this case was closed.
11. It was submitted further that the applicants do not stand to suffer prejudice as their interest was already determined by this court. They urged that the application be dismissed with costs to the Respondents. To support their submissions, they cited the cases of *Republic v Paul Kihara Kariuki, Attorney General & 2 others Ex parte Law Society of Kenya* (2020) eKLR, *Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties), Telkom Kenya Ltd v John Onchada (suing on his behalf and on behalf of 996 former Employees of Telkom Kenya Ltd)* (2014) eKLR among others.
12. The second set of submissions was filed on 21.09.2023. They submitted that the instant Application is *res judicata* as the court in Embu Civil Case No. 97 of 2005, *Motokaa Nthautho & 19 others v Attorney General (sued on behalf of the district land adjudication officer Mbeere District and District*



Land Registrar Embu District) & Muchiri Kombo & 19 others) determined ownership of the suit property in favour of the defendant. That this court cannot therefore issue the orders sought in the instant application as the same has been decided before a competent court of law. They urge that the application to be dismissed with costs. They cited the cases of *Njangu v Wambugu & another* Nairobi HCCC No. 2340 of 1991(unreported), *Siri Ram Kaura v M.J.E Morgan* CA 71/1960 (1961) EA 462 among others in support of their submissions.

13. I have considered the application, the responses made to it as well as the party's submissions. I find that the issue for determination is whether the Applicants are entitled to orders of status quo of the suit property.
14. Before proceeding on the issue of status quo, I must address the Respondents concerns that the application herein is sub-judice. The Respondents claim that there is a similar application filed in Siakago Succession Cause No. 47 of 2019 dated November 28, 2022. I have had a chance to look at the said application. The same is seeking for the court to stay any further succession proceedings in regard to the Estate of Mutokaa Nthautho (Deceased) relating to the suit land herein and any intended execution of the confirmed grant issued to his legal representatives pending hearing and determination of the suit herein.
15. It is not immediately clear whether said application has been heard or not. I must say though that it cannot be said that the two applications are similar in any way. The orders sought herein are for maintenance of status quo which is different from orders of stay sought in the other application. The factors to be considered in application for stay are very different from the factors to be considered in an application for *status quo*. For this reason, I must reject the Respondents argument that the application herein is sub judice to the application dated November 28, 2022.
16. On the issue of maintenance of *status quo*, the court addressed the same in the following cases as cited in *Fatuma Abdi Jillo v Kuro Lengesen & another* [2021] eKLR. In *Republic vs National Environment Tribunal, Ex-parte Palm Homes Limited & another* [2013] e KLR, Odunga J. stated,

“When a court of law orders or a statute ordains that the status quo be maintained, it is expected that the circumstances as at the time when the order is made or the statute takes effect must be maintained. An order maintaining status quo is meant to preserve existing state of affairs...Status quo must therefore be interpreted with respect to existing factual scenario...”

In *TSS Spinning & Weaving; Company Ltd vs Nic Bank Limited & another* [2020] e KLR, the unpacked the purpose of a *status quo* order as follows:

“In essence therefore, a status quo order is meant to preserve the subject matter as it is/ existed, as at the day of making the order. Status quo is about a court of law maintaining the situation or the subject matter of the dispute or the state of affairs as they existed before the mischief crept in, pending the determination of the issue in contention.”

In *Kenya Airline Pilots Association (KALPA) vs Co-operative Bank of Kenya Limited & another* [2020] e KLR, the purpose of a *status quo* order was explained as follows:

“..... By maintaining the status quo, the court strives to safeguard the situation so that the substratum of the subject matter of the dispute before it is not so eroded or radically changed or that one of the parties before it is not so negatively prejudiced that the status quo ante cannot be restored thereby rendering nugatory its proposed decision.”



Murithi Jin Boabab Beach Resort as quoted by F. Tuiyot Saifudeen *Abdullabi & 4 others* in Mombasa High Court Misc. Civil Cause No. 11 of 2012, described the nature of a status quo order as follows:

“In my view, an order to status quo to be maintained is different from an order of injunction both in terms of the principles for 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. In its effect, an injunction may compel the doing or restrain the doing of a certain act, such as, respectively, the reinstatement of an evicted tenant or the eviction of the tenant in possession. An order for status quo merely leaves the situation or things as they stand pending the hearing of the reference or complaint.”

17. From the above, it is clear that the orders of status quo are granted at the discretion of the court. It is also clear that the said orders are different from orders of injunction. The Applicants apprehension is that the Respondents who have obtained a grant to the deceased's estate may proceed to transfer/transmit the suit land to the deceased beneficiaries before their case is heard. That the Respondents had already filed an application for the same in the succession proceedings in the lower court though the same was withdrawn, which is essentially an indication that they have the intention of disposing the property. That nothing would stop the Respondents from dealing with the suit land in a manner that would defeat their claim. They urge that it would be in the interest of justice to make orders for the maintenance of *status quo* to enable them ventilate their claim.
18. I am of a similar view that with the Respondents being at liberty to deal with the suit land as the legal representatives of the deceased, and given their conduct, nothing stops them from dealing with the suit land in a manner that would prejudice the Applicants case. I find that it would be in the interest of justice to maintain the status quo pending the hearing and determination of the Applicants application dated 07.11.2022. The circumstances of the matter before we require an order for maintenance of status quo.
19. The upshot of the foregoing is that I allow the notice of motion application dated February 21, 2023 in terms of prayer no (3).
20. Costs shall be in the cause.

**RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 20<sup>TH</sup> DAY OF FEBRUARY, 2024.**

Delivered in the presence of;

Applicants - present

Mutiso for Karoki for respondent – present

Court Assistant - Leadys

**A. KANIARU**

**JUDGE- ELC, EMBU**

**20.2.2024**

