



Kamanga (Suing as the Administrator of Jacinta Wanjiru Mukonyo) v Embakasi Ranching Company Limited & 4 others (Environment & Land Case E394 of 2022) [2024] KEELC 3639 (KLR) (30 April 2024) (Ruling)

Neutral citation: [2024] KEELC 3639 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E394 OF 2022**

MD MWANGI, J

APRIL 30, 2024

BETWEEN

**FRANCIS MUKONYORO KAMANGA (SUING AS THE ADMINISTRATOR OF JACINTA WANJIRU MUKONYO) PLAINTIFF
SUING AS THE ADMINISTRATOR OF JACINTA WANJIRU MUKONYO**

AND

**EMBAKASI RANCHING COMPANY LIMITED 1ST DEFENDANT
LUCY NYOKABI 2ND DEFENDANT
WALTER KIGERA 3RD DEFENDANT
MARY GATHONI WAINAINA 4TH DEFENDANT
CHIEF LAND REGISTRAR 5TH DEFENDANT**

RULING

(In respect of the Plaintiff's application dated 27th February, 2024 seeking to review, vary and/or set aside the directions issued on the 18th January, 2024 pending the hearing and determination of this suit)

Background

1. The application for determination is the Plaintiff's application dated 27th February, 2024 substantively seeking the following orders:
 - a. That the Honourable Court do review, vary and/or set aside the directions issued on the 18th January, 2024 pending the hearing and determination of this suit.



- b. That an order do issue directing parties to maintain the *Status Quo*, prior to the directions issued on 18th January, 2024 by Honourable Justice E. Wabwoto pending the hearing and determination of this suit.
 - c. Any other order that this court deems just and expedient.
 - d. Costs of this Application.
2. The application is premised on the grounds on the face of it and the Supporting Affidavit of Francis Mukonyoro Kamanga deposed on the 27th February, 2024. The Applicant's case is that the 4th Defendant filed an application dated 9th November, 2023 seeking for restraining orders against him or his agents from dealing, developing, interfering, alienating, or otherwise disposing of property LR. No. Nairobi/Bock 105/7708. The said application was slated for directions on the 18th January, 2024 before Wabwoto J. The Learned Judge issued directions to the effect that the Plaintiff was to farm on the suit property up to the month of March 2024 for him to harvest his crops. The Plaintiff was further barred from accessing the suit property pending the hearing and determination of the suit.
 3. The Applicant asserts that prior to the orders of 18th January, 2024, he had obtained injunction orders in his favour against the Defendants pursuant to his application dated 23rd November, 2022 having occupied and farmed the said property for more than 27 years.
 4. He argues that the court's directions issued on the 18th January, 2024 are highly prejudicial and that they contradict the injunction orders granted on 2nd February, 2023, which orders were preservative in nature.

4th Defendant's Replying Affidavit

5. The application is opposed by the 4th Defendant, Mary Gathoni Wainaina, through her affidavit deposed on the 12th March, 2024. She asserts that she is the legal owner of the suit property and that the Plaintiff/Applicant has never been in occupation of the same. She avers that when she acquired the farm, it had a sisal plantation and upon clearing the sisal, she put up a fence on the boundaries of the plot.
6. She avers that upon becoming aware of the order allowing the Plaintiff access to the suit property she filed the application under certificate of urgency dated 9th November, 2023, seeking to lift the orders allowing the Plaintiff access to the property. The deponent asserts that Wabwoto J, upon realizing the application had not been served, on 18th January, 2024 directed that the Applicant be allowed to harvest the current crop that was planted after he had been given access, thereafter to vacate the land until the determination of the suit.
7. The 4th Defendant further avers that the annexed photos do not show any farming activities except for the fence/trees planted by the 4th Defendant. The suit property is currently vacant. The continued activities on the suit property, if allowed, will greatly affect her. She maintains that she is the legal owner of the suit property. It is therefore in the interest of justice that the Plaintiff's application be dismissed with costs.

Applicant's Further Affidavit

8. The Applicant filed a further affidavit sworn on the 20th March, 2024 in which he denied the assertions by the 4th Defendant that she is the legal owner of the suit property. He maintains that he has been in occupation of the suit property for 27 years and was cleared for processing of the title in the year 2010. This was way before the 4th Defendant was allegedly allocated the same plot number in 2021.



9. He states that he fenced the property in 1995 and has been farming therein without any interference. The 4th Defendant is trying to mislead the court in alleging that he gained access to the suit property through the court order yet he has been in possession of it since 1995. The orders sought were to restrain the Defendants from interfering with his possession.
10. The Applicant contends that if at all the 4th Defendant is the legal owner of the suit property; it defeats logic why she did not take any legal action against him for the past 27 years. He maintains that he is only interested in obtaining justice and to secure his proprietary rights through the court. His continued use of the suit property will not cause any prejudice whatsoever to any party. He prays that the court grants him the orders sought.

Court's Directions

11. The court directed the parties to file written submissions which they did. Only the Plaintiff complied. The court has had occasion to read the submissions which now form part of the record of its court.

Issues for Determination

12. I have considered the affidavit evidence, the annexures thereto, the submissions filed and the applicable law. Two issues arise for determination, namely;
 - a. Whether the Court orders issued on 18th January, 2024 are amenable to review, varying or setting-aside.
 - b. Whether an order of *Status Quo* ante should issue maintaining the position prior to the directions issued on 18th January, 2024 by Honourable Justice E. Wabwoto

Analysis and determination

A. Whether the Plaintiff's Application has Met the Threshold for Review, Varying or Setting-aside.

13. The Applicant has sought to review, vary and/or set aside the directions issued on the 18th January, 2024. From the record, the orders issued by the Learned Judge, Wabwoto J, on the said date were to the effect that:

“The Plaintiff is hereby permitted to harvest the current maize on the suit property and subsequently thereafter, there shall be no further activities on the suit property pending the hearing and determination of the suit herein”

14. The Plaintiff argues that the above orders issued on 18th January, 2024 contravene the orders issued on 30th January, 2023 stating that:

“the application dated 23rd November, 2022 not being opposed is allowed in terms of Prayers 5, 6 and 7.”

15. It is important to set down the orders sought in the application of 23rd November, 2022. The prayers were that:
 5. That pending the inter-parte hearing and determination of this suit, this Honourable Court do issue an injunction restraining the 1st, 2nd, 3rd, 4th and 5th Defendants by themselves, their servants, employees, agents or any other person acting under their instructions from selling, allocating, interfering, entering, subdividing, transferring or in any other way interfering with property known as Nairobi Block 105/7708.



6. That pending the inter partes hearing and determination of this suit, the 5th Respondent be restrained by way of a temporary injunction from making any entry in favour of the 4th Respondent, with regards to property LR Number Nairobi Block 105/7708, and if already entered, delete such entry of the 4th or 1st Respondent's name as to restore *Status Quo* on the system, to maintain the name of Jacinta Wanjiru Mukonyoro (Deceased) or the Plaintiff/Applicant.
7. That pending the inter partes hearing and determination of this suit, a temporary injunction do issue restraining the 5th Respondent from issuing any title of the property known as Nairobi Block 105/ 7708 in favour of the 4th Respondent, Mary Gathoni Wainaina or any other person other than Jacinta Wanjiru Mukonyoro (Deceased) or the Plaintiff/ Applicant.
16. Having highlighted the orders issued by the court on the respective dates, the question then is whether the Plaintiff's Application has Met the Threshold to warrant a review of the orders of 18th January, 2024.
17. The applicable law on review of orders is section 80 of the [Civil Procedure Act](#) and Order 45 Rule 1 of the [Civil Procedure Rules](#).
18. Section 80 of the [Civil Procedure Act](#) Cap 21 provides as follows: -
 - “ Any person who considers himself aggrieved—
 - a. by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
 - b. by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”
19. Order 45 Rule 1 (b) of the [Civil Procedure Rules](#) on the other hand spells out conditions that must be met in an application for review of a decree or order as follows:
 - a. Discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the applicant's knowledge or could not be produced by him at the time when the decree was passed or the order made,
 - b. mistake or error apparent on the face of the record,
 - c. or for any other sufficient reason,
 - d. the application must be made without unreasonable delay.
20. In [Republic v Public Procurement Administrative Review Board & 2 others](#) [2018] eKLR, the court held that: -

“Section 80 gives the power of review and Order 45 sets out the [Rules](#). The rules restrict the grounds for review. The rules lay down the jurisdiction and scope of review limiting it to the following grounds; (a) discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made or; (b) on account of some mistake or error apparent on the face of the record, or (c) for any other



sufficient reason and whatever the ground there is a requirement that the application has to be made without unreasonable delay.”

21. In *Republic v Advocates Disciplinary Tribunal Ex parte Apollo Mboya* [2019] eKLR High Court of Kenya Nairobi Judicial Review Division Misc. Application No. 317 of 2018, Mativo, J identified the following principles from a number of authorities: -
- i. A court can review its decision on either of the grounds enumerated in Order 45 Rule 1 and not otherwise.
 - ii. The expression "any other sufficient reason" appearing in Order 45 Rule 1 has to be interpreted in the light of other specified grounds.
 - iii. An error which is not self-evident and which can be discovered by a long process of reasoning cannot be treated as an error apparent on the face of record justifying exercise of power under Section 80.
 - iv. An erroneous order/decision cannot be corrected in the guise of exercise of power of review.
 - v. A decision/order cannot be reviewed under Section 80 on the basis of subsequent decision/judgment of a coordinate or larger Bench of the tribunal or of a superior court.
 - vi. While considering an application for review, the court must confine its adjudication with reference to material, which was available at the time of initial decision. The happening of some subsequent event or development cannot be taken note of for declaring the initial order/decision as vitiated by an error apparent.
 - vii. Mere discovery of new or important matter or evidence is not sufficient ground for review. The party seeking review has also to show that such matter or evidence was not within its knowledge and even after the exercise of due diligence, the same could not be produced before the court/tribunal earlier.
 - viii. A mistake or an error apparent on the face of the record means a mistake or an error, which is prima-facie visible and does not require any detail examination. In the present case the petitioner has not been able to point out any error apparent on the face of the record.
 - ix. Section 80 of the *Civil Procedure Code* provides for a substantive power of review by a civil court and consequently by the appellate courts. The words occurring in Section 80 mean subject to such conditions and limitations as may be prescribed thereof and for the said purpose, the procedural conditions contained in Order 45 Rule 1 must be taken into consideration. Section 80 of the *Civil Procedure Code* does not prescribe any limitation on the power of the court, but such limitations have been provided for in Order 45 Rule 1.
 - x. The power of a civil court to review its judgment/decision is traceable in Section 80 *CPC*. The grounds on which review can be sought are enumerated in Order 45 Rule 1.
22. In the instant application, the Applicant argues that the orders issued on 18th January, 2024, contradict those issued on the 30th January, 2023. Further that the said orders will occasion a great injustice upon him having been in occupation of the suit property for more than 27 years as the proprietor.
23. In my view the instant application seeks for variation of the orders rather than a review under section 80 of the *Civil Procedure Act* as alleged. It is a case of purported contradiction of the court orders and not one of discovery of new and important matter or evidence. The application is not based on the established grounds for review as provided in law. An order for review cannot therefore issue.



24. I have taken the trouble of replicating prayers 5, 6 and 7 of the application dated 23rd November, 2022. It is clear to me that the Orders issued on 18th January, 2024 only compliment those issued on the 30th January, 2023. They do not contradict them.
25. For avoidance of doubt, the prayers issued on 30th January, 2023, particularly prayer 5, was aimed at restraining the Defendants from selling, allocating, interfering, entering, subdividing, transferring or in any other way interfering with the suit property. The orders of 18th January, 2024 on the other hand allowed the Plaintiff to harvest the current maize only, and prohibited any further activities on the suit property.
26. I therefore see no basis for allowing the Plaintiff's application for review under section 80 of the [*Civil Procedure Act*](#).

B. Whether an Order of Status Quo ante should Issue Maintaining the Position prior to the Directions Issued on 18th January, 2024

27. [*Black's Law Dictionary*](#), Butter Worths 9th Edition, defines *Status Quo* as a Latin word which means "the situation as it exists".
28. The purpose of an order of *Status Quo* has been reiterated in a number of decisions:
29. In [*Republic -vs- National Environment Tribunal, Ex-parte Palm Homes Limited & Another*](#) [2013] eKLR, 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..."
30. In [*TSS Spinning & Weaving; Company Ltd -vs- NIC Bank Limited & Another*](#) [2020] eKLR, the court explained 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."
31. In [*Kenya Airline Pilots Association \(KALPA\) vs Co-operative Bank of Kenya Limited & another*](#) [2020] eKLR, 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."
32. The case of [*Thugi River Estate Limited & another vs National Bank of Kenya Limited & 3 others*](#) [2015] eKLR the court noted that a *Status Quo* order can be given by the court exercising its general



jurisdiction. Further that the order need not necessarily be prayed for by the parties and in fact can be originated by the court. The Court stated as follows:

“Firstly, an order of *Status Quo* will issue through a judicial process. Where the court in exercise of its general or statutory jurisdiction grants orders for maintenance in situ of a particular state or set of facts... the second or alternative order for *Status Quo* is the one issued by the court as a case management strategy. It is issued to provide assistance to the case. It also maintains a particular state of affairs or set of facts. Unlike a conservatory order or injunctive order, it is not descriptive. It is originated either by the court or by the consent of the parties. Often the court would not have been moved by either party. The court then expects an existing state of affairs or facts be preserved until a particular occurrence or until the courts’ further orders. It is intended to also freeze the state of affairs. State of affairs however do not always remain static, so it is always crucial for the court to be very specific and neat in its description of what state of affairs is to be preserved.”

33. From the above cases, *Status Quo* orders can be issued for the purpose of preserving the subject matter of the property, for case management reasons and in a bid to prevent prejudice from being visited against either party to the case. In the instant case, both the Plaintiff and 4th Defendant are laying claim to the suit property. It is further evident from the evidence adduced through the affidavits that the Plaintiff is in possession of the suit property. In his wisdom, the Learned Judge E. Wabwoto decided to freeze any activities that might imperil the final outcome of the case by barring any activities on the subject property pending the determination of the suit.
34. The orders issued on 18th January, 2024 are aimed at preserving the subject matter pending the hearing and final determination of the main suit. I therefore find no need or basis for issuing any other or further orders to that effect.

Conclusion

35. Based on the foregoing, I find no merit in the Plaintiff’s application dated 27th February, 2024. Consequently, the application is dismissed with costs to the 4th Defendant. The orders issued on 30th January, 2023 and those issued on the 18th January, 2024 shall remain in force pending the determination of this suit.

It is so ordered

RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON 30TH APRIL, 2024.

M.D. MWANGI

JUDGE.

In the virtual presence of:

Ms. Muthungi for the Plaintiff

No appearance for the Defendants

Yvette: Court Assistant

