



Wangui & another v Homeplus Realtors Limited & another (Environment and Land Appeal E079 of 2023) [2024] KEELC 3459 (KLR) (30 April 2024) (Ruling)

Neutral citation: [2024] KEELC 3459 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND APPEAL E079 OF 2023**

**JA MOGENI, J
APRIL 30, 2024**

BETWEEN

JANE MURIGI WANGUI 1ST APPELLANT

MUGAMBI IMANYARA 2ND APPELLANT

AND

HOMEPLUS REALTORS LIMITED 1ST RESPONDENT

MAINA GIKONYO 2ND RESPONDENT

RULING

1. This ruling is essentially a determination of a Notice of Motion dated 23/10/2023 brought under a Certificate of Urgency. It is expressed to be brought under Article 50 (1) of the [Constitution](#), Order 40 Rule 1, Order 51 Rule 1 of the Civil Procedure Rules and Sections 1A, 1B and 3A and 63 (e) of the [Civil Procedure Act](#). The applicants – Jane Muringi Wangui and Mugambi Imanyara – are the appellant/applicants in the Appeal while the respondents – Homeplus Realtors Limited and Maina Gikonyo – are the respondents. The appellant/applicants seek, inter alia, an order of preservation of status quo. More specifically, the prayers sought are as follows;

- i. Spent
- ii. That pending the hearing and determination of the appeal, this Honorable Court be pleased to issue an order maintaining status quo to the effect that the appellants/applicants shall remain in quiet and peaceful possession of the suit premises being Shop No. 3 on Land Reference No. 209/2632 & 4355 – Garden Chambers Nairobi along Moktar Daddah Street without any interference whatsoever by the Respondents, their servants, agents, officers, staff and/or any other persons in rem acting at their behest.



- iii. That by grant of prayer (b) and for expediency sake, the appeal be fixed for hearing and final determination on priority basis after the scheduled mention before Hon. Lady Justice J.A Mogeni on 14 November 2023.
 - iv. That this Honorable Court do make such further orders as it may deem fair and just in the interest of justice.
 - v. That costs of this application be provided for.
2. The motion, or application, is premised on the grounds 1- 22 on the face of it as well as the supporting affidavit sworn by the 1st appellant/applicant Jane Muringi Wangui on 23/10/2023 and a further affidavit in response to the Respondent's Replying Affidavit sworn by Sylvester Ndungu Njonde on 3/10/2023 on her own behalf and on behalf of the 2nd appellant/applicant.
 3. She deposed, inter-alia; that on she is a tenant in shop no. 3 of the suit property and that she had authority to for bother the appellants as shown by the annexed affidavit marked as JMW-1.
 4. It was her contention that she has a Tenancy-Landlord relationship with the respondents which has neither been terminated by parties nor by operation of the law.
 5. That the court ruling fort 21/09/2023 set aside orders issued on 4/07/2023 leading to issuance of instructions to Pyramid Auctioneers to evict the appellant/applicants in execution of the BPRT Order OF 9/06/2022 which is the subject of the appeal filed herein as shown through annexture JMW-5.
 6. It is her contention that the Appellants/Applicants are in possession of the suit property having taken over the suit premises on 18/07/2023 and filed the appeal herein. That the respondents have neither filed for eviction nor sought break in orders that would warrant the appellants/applicants being dispossessed of the suit premises.
 7. That the instant Appeal was filed on 4/07/2023 yet the Respondents have instructed Pyramid Auctioneers through a letter dated 12/10/2023 to evict appellants. That if this were to happen the appellants will suffer substantial loss and damage and the instant appeal will be rendered nugatory.
 8. That the orders of status quo prayed for by the applicants/appellants will not prejudice the respondents in any way.
 9. In the further affidavit dated 21/02/2024 the applicants/appellants have averred the court is not *functus officio* and therefore it can hear the application dated 23/10/2023 and that occupation and possession has not changed since it is the applicant who is in possession of the suit property and has never been evicted.
 10. Further that there is a pending appeal and the only tenants on the suit property are the applicant and this court has issued status quo orders to preserve the substratum of the suit property pending appeal. Therefore, the replying affidavit sworn by the respondent should be dismissed. They argue that the status quo orders should issued to preserve the suit until the appeal is heard and determined.
 11. The application was opposed by the Respondents vide a replying affidavit sworn on 31/10/2023 by Sylvester Ndungu Njonde and Grounds of Opposition on even date. He deposed that he had authority to swear the affidavit on behalf of the 2nd respondent and he produced the authority marked as SNN1. He further deposed that the Honorable Court is *functus officio* and had no jurisdiction to entertain the application having rendered its ruling on 21/09/2023.



12. He further deposed that the court's ruling took into consideration the fact that it was the respondents who were on the suit property since the appellant/applicants had been evicted through the lawful application of the BPRT ruling.
13. The respondents contend that the applicant/appellants are the ones on the suit premises having allegedly unlawfully removed the 2nd respondent's goods and items of trade from the suit premises and forcefully imposed themselves as tenants without any contract and that the 2nd respondent intends to challenge the said illegal eviction. Further that despite evicting the 2nd respondent the applicants/appellants have not remitted any rent to the respondents.
14. The respondents aver that the applicant/appellants are in rent arrears to the tune of Ksh 2,501,250 as at 30/05/2023 but further deny that the applicants/appellants are tenants of the respondents and aver that they are in possession of the suit premises illegally and unlawfully. The respondent avers that the application is *functus officio* and it should be dismissed with costs and to allow the matter to proceed for appeal.
15. The suit herein abated and thus the court is *functus officio*. That the same is not tenable as it violates the principles of res judicata and thus is an abuse of the court process. That the instant application is similar to the applications dated 4/07/2023 and 10/07/2023 hence an abuse of the court process.
16. It was agreed that the application be disposed of by way of written submissions. The Applicants filed their submissions on 27/02/2024. The 1st and 2nd Respondents filed their submissions on 19/3/2024.
17. 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 Appeal is heard and determined. The only activities being restrained are any attempt to evict the applicants/appellants will be restrained since this will render the appeal nugatory. That the applicants/appellant stand to suffer irreparable harm if the orders are not issued as the respondents had already instructed the Pyramid Auctioneers to evict the applicants/appellants without a court order. That the Respondents claim that they are implementing the decision of the BPRT Tribunal. They urge that their application be allowed.
18. The Respondents filed submissions and submitted that the application before the court is similar to an application that was already determined by this court through its ruling of 21/09/2023. Hence there is lack of jurisdiction. That having rendered its ruling the court was rendered *functus officio* and on that account it lacks the jurisdiction to entertain the instant application.
19. 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.

Whether status quo should be maintained

20. An order for status quo technically means that things be left as they are until the determination of a certain facts. The meaning of status quo was defined by the Court in Nairobi Civil Appeal No. 33 of 2012 *Shimmers Plaza Limited v National Bank of Kenya Limited* [2015] eKLR "the present situation, the way things stand as at the time the order is made, the existing state of things. It cannot therefore relate to the past or future occurrences or events". The purpose of which is to maintain the substratum of the suit.
21. The Respondents have deposed that the applicant/appellants are the ones in occupation of the suit property having evicted allegedly unlawfully the 2nd respondent. This fact of being in possession is also



averred by the applicants/appellants. The Court of Appeal in the case of *Mugah v Kunga* [1988] KLR 748, upheld the practice of issuing status quo orders in land matters and stated as follows:

“Status quo orders should always be issued for purposes of preserving the subject matter. This court’s practice direction vide Gazette Notice No. 5178/2014 have followed suit. Practice direction No. 28(k) is relatively clear. It gives the court the leeway and discretion to make an order for status quo to be maintained until determination of the case.”

22. At this juncture I will state that the applications dated 29/06/2023 and 10/07/2023 sought for injunctive orders and stay orders under Order 40 rule 2 and Order 42 rule 6 respectively. The respondents have averred that this court is functus having issued a ruling on the two applications on 21/09/2023. To put issues in perspective the court will seek to draw a distinction between status quo orders and injunction. Justice Murithi J in the case of Mombasa Misc. Civil Application (JR) No.26 of 2010 *Republic -v- The Chairperson Business Premises Rent Tribunal at Mombasa (Bench Mochache) Exparte Baobab Beach Resort (Mombasa Limited) & Monica Clara Schrirel* sought to draw the distinction and opined:

“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.” (see in The Matter of an Application By *Saifudeen Abdullabhai & 4 Others For Leave To Apply For Judicial Review And For Orders Of Certiorari And Prohibition* [2013] eKLR).

23. Further, in the case of *Fatuma Abdi Jillo v Kuro Lengesen & another* [2021] eKLR. In *Republic v National Environment Tribunal, Ex-parte Palm Homes Limited & Another* [2013] eKLR, Odunga J. (as he then was 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 v 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) v 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 Abdullahi & 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.”

24. It also not true that the court in addressing the earlier applications addressed the issue of status quo. The court has not pronounced itself on grant of orders of status quo post the ruling of 21/09/2023 which was about stay and grant temporary injunction and therefore the issue of the court being functus and lacking jurisdiction to entertain the application dated 23/10/2023 is not factual.
25. The applicant/appellants attached a letter dated 12/10/2023 to Pyramid Auctioneers to evict appellants. Flowing from the said letter, this Court draws a conclusion that the 1st respondent has begun the process of executing the Decree. The position as it is right now is that the suit premises are in possession of the applicants/appellants and should remain so pending the hearing and determination of the appeal.

Who should pay costs

26. It is trite that costs follow the events and a successful party is entitles to costs. This a discretionary power donated to this Court by Section 27, of the *Civil Procedure Act*, but such discretion must be judiciously exercised and the reasons thereof given. The Court has noted the circumstances that resulted in the filing of this Application was occasioned by the applicants/appellants. Subjecting the respondents to pay costs because the applicants/appellants were the successful party will not only be burdening on the respondents, but will be unfair. It is inevitable to conclude that the Appeal will not only cause litigation process to hang over the heads of the respondents, but will also deny the 1st respondent the right to enjoy the fruits of their judgment. This Court shall order that each party to bear its own costs.
27. To this end, this Court finds and holds as follows:
 - i. The appeal to be fast tracked and heard on priority basis within 45 days from the date hereof.
 - ii. Status quo be maintained to the extent that the applicants/ appellants shall remain in possession of the suit premises until the appeal is heard and determined as prayed in .
 - iii. Each party shall bear its own costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 30TH DAY OF APRIL 2024

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MOGENI J
JUDGE



In the virtual presence of;-

Ms. Gituma holding brief for Mr. Otieno for the Appellant

Ms. Wangui holding brief for Mr. Ndegwa for the Defendants

Caroline Sagina: Court Assistant

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MOGENI J

JUDGE

