



Onyango v Mbitto & 2 others (Environment & Land Case 62 of 2019) [2024] KEELC 4168 (KLR) (22 May 2024) (Ruling)

Neutral citation: [2024] KEELC 4168 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT & LAND CASE 62 OF 2019**

FO NYAGAKA, J

MAY 22, 2024

BETWEEN

DISMUS ONYANGO PLAINTIFF

AND

MICHAEL MALINGA MBITO 1ST DEFENDANT

NATIONAL LAND COMMISSION 2ND DEFENDANT

THE HONOURABLE ATTORNEY GENERAL 3RD DEFENDANT

RULING

1. By a notice of motion dated 20/11/2023 the 1st Defendant applied to this court under Sections 1A,1B, 3, 63(e) of the *Civil Procedure Act*, Order 42 Rule 6 of the *Civil Procedure Rules*, the inherent powers of the Court, and “all enabling provisions of the law” for the following orders.
 1. That the rental income received from Kitale Land Reference number 2116/210., IR No. 12091 [the suit property] be deposited in a joint interest earning account in the names of the Advocates for the Plaintiff and the Defendant pending their hearing and determination of this suit or the intended appeal by the plaintiff as the case may be.
 2. That upon grant of prayer one above, there be an order that all rental income due from Kitale Land Reference number 2116/210., IR No. 12091 [the suit property] shall be deposited into a bank account, held in the name of the advocates for the parties herein pending the hearing and determination of this suit.
 3. That the Advocates file in court statements of receivables from Kitale Land Reference number 2116/210, IR No. 12091 [the suit property] every three months and until such time as this suit shall determine the ownership of the suit property.
 4. The costs be reserved.



4. The application was brought under nine (9) grounds. The first one was that the defendant was the registered owner of the suit property and held the title sought to be impugned. The dispute had been in court since 2019 and he (applicant) had pleaded that the plaintiff was a trespasser on the suit property. The Plaintiff alleged that the defendant's title was not legitimate and the matter is parheard. That it was common ground based on the plaintiff's Notice of Motion dated 20/10/2023, that he acknowledged that there was a Certificate of Title charged to the bank. The plaintiff had filed a Notice of Motion to stay the proceedings pending appeal that was likely to prolong the matter. That as the parties litigated over the ownership of the property, it was fair and just that the rental income from the suit property be deposited in the joint interest earning account and the proceeds be released to the successful party at the determination of the intended appeal.
5. The plaintiff had been collecting rent from the property since trespassing into it yet, admittedly he did not have title to it. He had since appealed against the ruling of the Court which had allowed additional evidence and it was equitable that the rental income be deposited. Whereas the Applicant had a right to appeal the receivables from the suit property should be preserved as security for the deposit of the dispute hearing and released to the successful litigant after the trial. There would be no prejudicial occasioned by the order sought since it would preserve the rights of the parties pending the outcome of their appeal and the suit eventually. It was equitable to allow the application.
6. The application was supported by the affidavit of the defendant, Dr. Michael Malinga Mbitto, which is was sworn on 20/11/2023. He deposed that he was the registered owner of the property and held the title sought to be impeached. He annexed and marked as MMM1 a copy of the grant issued to Abdul Rehman on 10/01/1956 with a provisional certificate showing at Entry No. 9 showing a transfer to him. He pointed that the dispute had been in the Court since 2019 and the defendant was a trespasser. The Plaintiff had alleged that the title was not legitimate yet he did not have one. It was common ground, based on the Notice of Motion dated 20/10/2023 that the plaintiff acknowledged that there was a certificate of title charged to the bank. He annexed as MMM2 a copy of the plaintiff's Application pending appeal. Further, he deposed that the plaintiff had filed an application seeking to stay the proceedings pending appeal, which would prolong the matter hence it would be correct and fair for the court to balance the rights of the parties and the order, in equity, that the rental income from the property be deposited in Court until the dispute was heard and determined and the proceeds released to the successful litigant.
7. He deposed further that the plaintiff had leased out spaces in the suit property to various people (traders) who had set up, semi-permanent structures running a myriad of businesses and the traders paid rent to his detriment while he waited for the determination of the suit. The plaintiff would continue to receive rent from the suit property, yet he had neither superior title to it nor any right for that matter, over the rental income from the suit property. It was just that the rental income from the property be deposited in a joint interest earning account between the advocates of the parties and the proceeds be released to the party who would be successful at the determination of the appeal or suit. The plaintiff had been collecting rent yet he was a trespasser, and he admittedly did not have title to the land yet he had appealed against the ruling of the court which allowed additional evidence. It was equitable that the rental income be deposited as prayed.
8. Furthermore, the applicant's proprietary rights under Article 40 of *the Constitution* of Kenya could not be abrogated unless as provided by law since he had acquired the property legally. He deposed that from his own knowledge the law provided that a title issued by the registrar upon registration would be prima facie evidence that the person named thereon was the proprietor of the land except if the title would be defeated on the grounds of fraud, misrepresentation, or where the certificate was acquired



illegally or there was procedural impropriety or through a corrupt scheme, none of which were in the case in this matter.

9. He deposed that the plaintiff was occupying the land without any forceable right and he did not have a title to it. The Plaintiff's alleged letter of allocation referred to a different parcel of land. He had no document to challenge the title in the instant matter. The alleged forgery was unsubstantiated and the Applicant would defend the title at the trial. The rates on the property were in the name of the deceased and the applicant had been paying for the property yet the plaintiff was staying on it illegally. As a result, essentially, the Plaintiff was being funded by the applicant to be on the property.
10. The Applicant deposed further that he was repaying the loan taken over the property with the intention of developing it. He annexed and marked MMM3 a letter dated 05/06/2023 from the Kenya Commercial Bank. His deposition was that the property ought to be preserved as a security for the dispute and released to the successful applicant, and there would be no prejudice occasioned by the orders sought, since they would preserve the rights of the parties pending the outcome of the appeal and the suit. He knew that the Respondent had leased out spaces to various traders located in the prime area in the center and was receiving rent of more than Kshs 300,000/= . He wished the rental proceeds to be deposited in court pending the outcome of the litigation herein. It was equitable to allow the application.
11. The application was opposed through the affidavits sworn by Paschal Okubasu who swore it on 05/12/2023. He deposed that the application was misconceived in law and made in utmost bad faith. To him the orders sought seemed to suggest a review or setting aside of the order of status quo that was to be maintained as at 05/03/2020 by which the Honorable Court granted injunctive orders against the applicant upon filing the Application dated 09/10/2019. He annexed a copy of the order as OK1.
12. He deposed further that the orders issued on 05/03/2020 still subsisted and unless they were set aside or reviewed through a substantive Motion the instant application could not be entertained as it was an attempt to vary the orders. Further, he had pleaded fraud hence the purported title held by the defendant was fraudulent and could not pass legal title to the defendant. That by the applicant's own admission, he acknowledged that the respondent was in possession from time immemorial (that is 1982) to date, before he even acquired the illegitimate title. As such he could not purport to suffer loss since he had never occupied the land.
13. On the contrary substantial loss could be suffered by the Respondent if the Defendant's suit was dismissed yet he admitted and acknowledged he had taken a loan with the bank and his failure to repay it may need the bank exercising its statutory power of sale. If the court were to vary the orders of 05/02/2020, the same needed to be balanced with an order that the loan proceeds received from the bank be deposited in full in a joint account held by the respective advocates that as admitted by the defendant, his title had been challenged on the ground of fraud. That it was true that the suit property had semi-permanent structures which arising out of hard economic times, did not fetch more than Kshs 50,000/= a month and which income was used as a source of livelihood to the family of the deceased. If the same is taken away, the family would be left destitute, yet the applicant continued to benefit from the proceeds of the loan. That following the orders of this Court of 05/03/2020, the instant application was moot.
14. The applicant filed his further Affidavit, he swore on 11/01/2024 in response to that sworn by the Respondent on 05/12/2023. He deposed that before the filing of the suit, he had instructed Kidiavai and Company Advocates to issue a notice to the Plaintiff to vacate his property. The pleadings were served to his Advocates, the said law firm above, who issued the demand letter. The plaintiff approached the court before he could move it and obtained an order for the status quo at the time of



filing the suit to be maintained. The order was not served on him directly since he was unwell and out of the country. At the point of presentation of the charge to the bank, it was obvious that the order had not been registered to bar the registration. The charging had commenced long before as he had already deposited the title with the bank and all documents executed. Further that he charged the property to raise land rates for the property and incidental expenses, a loan which he was servicing to the time of the application and he had no intention of defaulting. That it was incorrect to argue that the application would have the effect of setting aside the orders issued earlier, since his motion was a reaction, or to the moving of the court for staying of the orders on appeal for stay pending appeal. That the orders would remain in force as both pursued the appeal.

15. The Application was canvassed by way of written submissions. This Court shall consider the submissions as it analyses the arguments in the application and determine thereon. Thus, the Court has carefully considered the law, the applications and the submissions by learned friends. The issue that commends itself to me is whether the Application is merited, and who to bear the costs of the Application.
16. Applying the Issue, Rule, Application and Conclusion (IRAC) method to determine this Application, the first point to discuss is what the issue is between the parties at this stage. It is not difficult to understand that the issue is the bone of contention between parties which they present to a court of law to determine. The Rule is the applicable law while Application is the process of analyzing the facts in relation to the law (the relational aspect of digesting both the facts and the law) and the Conclusion is the finding the court makes at the end of the process. The law may be statute or even case law.
17. It is worth of note that the suit is part-heard. It was filed on 09/10/2019. For a number of reasons explained in another Ruling I have delivered separately, it did not proceed to hearing until 16/12/2021 whereupon the Plaintiff applied for adjournment to call a last witness. After that, he sought adjournment twice to avail the witness who did not attend the hearing the next time the suit was to be heard. The Plaintiff then prayed for issuance of a warrant of arrest against the witness who attended on a subsequent date. When the witness did not allegedly give any meaningful evidence (according to the Plaintiff) the Plaintiff sought yet another adjournment to summon another witness. The witness did not attend twice, and the Plaintiff moved the Court to close his case the second time on account of the witness' phone being switched off on the material date.
18. The record as summarized above was the terrain the Plaintiff took the Court through before the 1st Defendant too had his share of adjournments since 17/10/2022 on account of being very ill terminally and out of the country for treatment on 07/06/2023. When he sought time to file an Application to include a document he had not filed. Upon the leave being granted in a Ruling delivered on 04/10/2023 the Plaintiff sought to stay the proceedings pending Appeal, an Application this Court has simultaneously ruled on as the instant one.
19. The issue is whether the Court should order, in the intervening period, the depositing of proceeds of rental income from and/or receivables on the premises built on the suit land to be deposited in a joint interest earning bank account in the names of Advocates for both the Plaintiff and the Defendants and filing of quarterly statements until the determination of the suit. Thus, at the core of the contention between the parties herein is the fact that the Plaintiff argues that the title held by the 1st Defendant/Applicant is forged. On the other hand the Defendant argues that the Plaintiff is a trespasser who is earning proceeds from the suit land to his detriment, and since there is an application dated 27/10/2023 seeking to stay the proceedings herein (I have ruled on it on the same date as this ruling) it is in the best interest that the proceeds from the suit land be deposited in a joint interest earning account pending the hearing and determination of the suit, and quarterly statement on receivables be filed in Court pending the determination of the suit.



20. I now turn to the “Rule” in this Application. The law regarding interlocutory applications of this nature is not Order 42 Rule 6 of the Civil Procedure Rules as alluded to in the Application. That Rule is applicable in so far as the Applicant shall have filed an appeal from decision of the Court, which he/she wishes to be determined first before either execution proceeds or proceedings go to the end. In my view it is not open for a party who has not appeal (cross-appealed for that matter) to base the Rule for an application of this nature. The Applicant herein does not seek stay of either proceedings or execution. Thus, the Rule is irrelevant.
21. The Applicable law is Sections 63(e) of the *Civil Procedure Act* which provide respectively as follows:
- 3A Saving inherent powers of court
- “Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”
- 63 Supplemental Proceedings
- “In order to prevent the ends of justice from being defeated, the court may, if it is so prescribed- (e) make such other interlocutory orders as may appear to the court to be just and convenient.”
4. In applying the facts to the law in the instant Application, it is important to bear in mind that the purpose of an interlocutory order is to address a specific issue which is to be determined in the interest of both parties. It is neither to punish nor disadvantage either party but to balance the interests of both contestants and arrive at a determination that justice demands. In the same manner as a status quo order preserves the subject matter, as was stated 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”, so should an order of the nature sought herein. However, the difference between the instant application and one where a status quo is granted is that the instant one is to preserve substratum of the suit in a futuristic or ongoing manner while the status quo basically freezes any activities contrary to what has been ongoing at the point such an order is issued.
5. The Applicant argues that he is the registered owner of the suit land, his title genuine, he pays land rates for it to the exclusion of the Plaintiff and he has taken a loan over it to develop the land yet the Plaintiff who allegedly is a trespasser has moved to occupy and use the proceeds from rental premises he has put up on the land, to the detriment of the owner. The Applicant argues that the premises put up on the property fetch Kshs 300,000/= while the Respondent argues they fetch a paltry Kshs 50,000/=. The Applicant argues the proceeds are benefitting the alleged trespasser while the Plaintiff argues they are for the use of the family. The Applicant argues that the matter has lain in Court since 2019 and the Plaintiff wants it to be in Court for longer while benefitting from the occupation and use of the suit land to the prejudice of the owner while the Plaintiff argues that he is the true owner and rightly in use and occupation and that the prayer for stay of proceedings herein is because of being prejudiced that the introduction of the evidence that the title is charged to the bank creates an overriding interest by the bank over the suit land and changes the character of the suit hence the need to appeal first against the order and hear what the Appellate Court decides on the issue. The Plaintiff argues that the title held by the Defendant is a forgery while the Applicant argues that it is not and that indeed the Plaintiff acknowledges the title to be in existence. The Applicant argues that besides paying rates over the property the Plaintiff is not. Further, on the one hand that besides him repaying the loan he took over the property as charged to the Kenya Commercial Bank he is not in use of the same. On the other hand the Respondent argues that the loan proceeds be deposited in Court in the meantime since in case of default he would be prejudiced.



6. It is on those clashing arguments and submissions thereon that the Applicant argues that it is fair and just that the rental income from the suit property be deposited in the joint interest earning account and the proceeds be released to the successful party or the determination of the intended appeal. Further that no prejudicial would be occasioned by the order sought since it would preserve the rights of the parties herein.
7. Lastly, the Respondent argues that the application is an indirect prayer for variation of the orders issued by this honourable Court on 05/03/2020. With such a deep argument it is important for the court to consider the orders that referred to, their import and status. On 05/03/2020 in determining the Application for injunction which the Plaintiff/Respondent herein file, my predecessor learned judge ordered as follows:

“The status quo on the said land currently prevailing shall be maintained pending the hearing and determination of the suit.”

4. The Order stated above was issued after the Court made it pursuant to the Application dated 09/10/2019. The Application was brought under Order 40 Rules 1, 2, 3 and 9 and Order 51 Rule 1 of the Civil Procedure Rules and Sections 1A, 1B, 3, 3A and 63(e) of the Civil Procedure Act. Of importance to note is that Order 40 Rule 6 which gives the period which an injunction is to last provides as follows:

“Where a suit in respect of which an interlocutory injunction has been granted is not determined within a period of twelve months from the date of the grant, the injunction shall lapse unless for any sufficient reason the court orders otherwise.”

4. It is clear that while order of the status quo granted on the material date may appear different from an injunction as was sought, it was meant to preserve in a similar manner as the injunction. That is why it was predicated upon the balance of convenience as held in *Giella v. Cassman Brown* [1973] EA 358 as the judge held. In terms of Order 40 Rule 6 of the Civil Procedure Rules cited above, an order granted pursuant to applications made under Order 40 of the Civil Procedure Rules lapses within twelve months unless for any sufficient reason the Court orders otherwise.
5. In the instant case, I have perused the Court record. I find no part thereof where the Court ordered that the status quo should last more than twelve months. Much as the last phrase indicated that it was to last the pendency of the suit that did not vary the holistic interpretation of the law that the same would lapse after twelve months since the suit ought to have been concluded within the twelve months (or 360 days as the rule is). Any period longer than that twelve months called for express extension by the Court for sufficient reasons to be recorded. Thus, the status quo order lapsed on 05/03/2021. It was not extended. Interim orders never last forever: parties who obtain the same risk losing their enjoyment and protection when they sit pretty that they have them. This is the case in this suit. Thus, I do not find the Application herein a design to vary what is not in existence.
6. The upshot is that having carefully analyzed the opposite clashing positions of the Applicant and the Respondent herein I find that since the Applicant holds title to the suit land, which title has not been cancelled as at the present time, the instant Application succeeds. It is in the interest of justice that all rents payable from or by traders or persons - natural or juristic - to whom the premises or semi-permanent or other structures built on the suit land have been rented or any other party who shall henceforth occupy the said premises (which should not be pulled down by anyone henceforth) shall be deposited in a joint interest earning bank account in the names of the Advocates for both the Plaintiff and the 1st Defendant. To be specific, the rents due from 01/06/2024 to the conclusion of this suit or



any appeal preferred from it or any interlocutory application shall be deposited in a joint account as described herein. Further, both the Plaintiff and the Defendant shall through their attorneys or agents immediately but not later than seven (7) days jointly take stock of the tenants in the premises and the rents they pay and establish the record which shall be reviewed quarterly (in every three months) and statements be filed in Court over the same, and the rents due for deposit in the joint account shall be made in accordance with the status of the tenancies. The monies deposited in such account shall be held for and the benefit of the party who the Court shall declare as lawful owner of the premises.

7. Lastly, and in the interest of justice for both parties and for purposes of ensuring that the property is not indirectly left to the bank for realizing the security thereof of the title charged to it, this Court hereby makes a further order that the 1st Defendant shall henceforth, by the fifteenth day of every succeeding three months, starting the 01/06/2024, to file by way of Affidavits and serve the Plaintiff certified copies of bank statement from the Kenya Commercial Bank that holds a charge over the suit land title, with the first affidavit being filed before the mention date to be give below, confirming that loan taken over the property is being duly serviced and up to date until repayment in full or discharge of the property, whichever comes earlier. In default of the up to date repayment of the loan by the Applicant the Plaintiff shall be at liberty to make a formal application for variation of the order on depositing the sum in the joint account.
4. This matter shall be mentioned on 12/06/2024 for confirmation of compliance of the orders hereinabove.
5. Orders accordingly.

RULING DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL THIS 22ND DAY OF MAY, 2024.

HON. DR. IURFRED NYAGAKA
JUDGE, ELC KITALE.

