



REPUBLIC OF KENYA



Gacanja v Darul Arqam Islamic Centre & 2 others (Environment & Land Case E165 of 2023) [2024] KEELC 4711 (KLR) (10 June 2024) (Ruling)

Neutral citation: [2024] KEELC 4711 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E165 OF 2023**

J OMANGE, J

JUNE 10, 2024

BETWEEN

WILSON GACANJA PLAINTIFF

AND

DARUL ARQAM ISLAMIC CENTRE 1ST DEFENDANT

DARUL ARQAM INSTITUTE 2ND DEFENDANT

DARUL ARQAM INTERGRATED SCHOOLS LIMITED 3RD DEFENDANT

RULING

1. The Plaintiff filed a suit dated 25th September, 2023 seeking various orders in respect of Nairobi/Block 23/71 formerly LR 209/9770 hereinafter referred to as the suit property. The Plaintiff averred that the Defendants are situated on the opposite suit property to wit LR NO 209/32277 currently known as LR 209/9770. It is the Plaintiff case that the Defendants have severally approached him with the intention of purchasing the suit property but that he has not accepted their offers. That in early 2023 the Defendants without his authority started constructing on the suit property, prompting him to file an application dated 25th September, 2023 seeking injunctive orders against the Defendants.
2. The application was allowed on the 28th November, 2024. Thereafter, the parties appeared in court on 12th February 2024 and notified the court that they were negotiating the matter.
3. On the 22nd April, 2024 the situation had changed somewhat as the Plaintiff notified the court they had filed a preliminary objection to the Defendants application dated 4th April, 2024 in which the Defendants had asked the court to issue orders inhibiting the Plaintiff from dealing with the suit property or demolishing any construction on the suit property. The specific orders sought by the Defendants in the application are;
 - a. Spent.



- b. Spent.
 - c. That pending the completion of the intended sale of the property known as Title Number Nairobi/Block 23/71 from the Plaintiff to the Defendants, this Honourable Court be pleased to issue an order of injunction restraining the Plaintiff either by himself, his agents, servants, personal representatives and/or any person acting under his authority from dealing with the property known as Title Number Nairobi/Block 23/71 in any manner that is prejudicial to the interests of the Defendants including but not limited to the destruction of developments on the aforementioned property.
 - d. That in the alternative to prayer 3 hereinabove, this Honourable Court be pleased to issue an order of injunction for a period of 120-days, restraining the Plaintiff to issue an order of injunction for a period of 120 –days, restraining the Plaintiff either by himself, his agents, servants, personal representatives and/or any person acting under his authority from dealing with the property known as Title Number/Block 23/71 in any manner that is prejudicial to the interests of the Defendants including but not limited to the destruction of developments on the aforementioned property, in order to aid the parties conclude the sale of the Suit property.
 - e. That this Honourable Court be pleased to issue any further orders in the interest of justice.
 - f. That the costs of this application be provided for.
- 4. The court gave directions on this application. While the parties were in the process of complying with the courts directions in respect of this application dated 4th April, 2024, the Defendants filed yet another application dated 22nd May, 2024 stating that the Plaintiff is in contempt of the orders of the court issued on 8th April, 2023. The Defendants further sought to have the Plaintiff committed to civil jail. This application comes up for mention on 2nd July, 2024.
 - 5. The court directed that the application dated 4th April, 2024 be canvassed by way of written submissions. Pursuant to these directions, both parties have filed written submissions.
 - 6. Counsel for the Defendants in answer to the preliminary objection submitted that they had uploaded a Memorandum of appearance which was vetted by Judiciary staff after which they were mapped as appearing in the case. However, the counsel forgot to upload it on the system after being mapped. This anomaly has since been rectified. Counsel urges the court not to strike out the application by the Defendants on this ground. Counsel refers the court to the case of Nicholas Kiptoo Arap Korir Versus Independent Electoral and Boundaries Commission and 7 Others in which the court stated that courts should aim at sustaining rather than striking out proceedings.
 - 7. On the suit property, it was the argument of the Defendants Counsel that the doctrine of promissory estoppel had been established by the Defendants hence the Plaintiff should not be allowed to go back on his word.
 - 8. On the other hand, Counsel for the Plaintiff insisted that the documents had been filed by a party who is not properly on record hence should be struck out. Counsel cited the case of Kenya Building Construction, Timber & Furniture Industries Employee versus Newline Furniture to support this argument.

The second issue that the Plaintiff raised is that the application was not based on any pleading as the Defendants have not filed a statement of defence or counterclaim.



9. Regarding the claim of purchaser's interest, the Plaintiff stated that the Defendants have not proved this claim as it is clear that there is no sale agreement between the Plaintiff and the Defendants in respect of the suit property.
10. The court has considered the affidavits filed by the parties and the submissions by all counsels in the matter. The following issues emerge for determination by the court; Whether the Defendants application is properly on record. Whether the Defendants application for injunction is merited.
11. On the question of whether counsel for the Defendants are properly on record, Order 9, Rule 1 of the [Civil Procedure Rules](#) provides as follows:

“Any application to or appearance or act in any court required or authorized by the law to be made or done by a party in such court may, except where otherwise expressly provided by any law for the time being in force, be made or done by the party in person, or by his recognized agent, or by an advocate duly appointed to act on his behalf: Provided that: -

 - a. any such appearance shall, if the court so directs, be made by the party in person; “
12. From the interpretation of Order 9 Rule 1 of the [Civil Procedure Rules](#), it would appear that no formal notice of appointment is required for an advocate who represents a party from the first instance. The opposite is true for an advocate who takes up a matter after a party has been acting in person. Order 9 Rule 7 of the [Civil Procedure Rules](#) which is applicable states: -

“Where a party, after having sued or defended in person, appoints an advocate to act in the cause or matter on his behalf, he shall give notice of the appointment, and the provisions of this Order relating to a notice of change of advocate shall apply to a notice of appointment of an advocate with the necessary modifications.”
13. The Defendants/Respondent's referred the court to the case in [Kenya Building, Construction, Timber & Furniture Industries Employees Union Versus Ms. Newline Furniture Ltd](#) [2017] eKLR, in which the Employment and Labour Relations Court found that the applications filed by an Advocate who had not yet lodged a Notice of Appointment of Advocates were irregular and invalid as they had been filed by a stranger to the proceedings.
14. The cited case is distinguishable from the instant case as in the cited case the advocates for the respondent had specifically asked for time to file a notice of appointment and had been directed to file a notice of appointment within 7 days which the advocate failed to do.
15. The Defendants have submitted that they filed a Memorandum of Appearance which was used to map them onto the e-filing portal, but which they inadvertently did not upload. This anomaly has since been corrected. I find that the preliminary objection on this aspect has no merit. I will therefore consider the application on merits.
16. The Defendants have sought for an injunction on the grounds that they have a purchaser's interest on the suit property. The Plaintiff strenuously oppose this application on the grounds that there was no sale agreement between the Plaintiff and the Defendants. Secondly, the Plaintiff argue that the Defendants have not filed a Defence. The application is therefore not based on any pleadings and should not be entertained.
17. I agree with the Plaintiff that a party who seeks an order of injunction should present the whole of its case and all the facts for consideration by the court. The court can only do this through pleadings which will be presented to the court to have the full picture of the applicant's case. The Defendants



failed to meet this basic test. It follows therefore that in the absence of a suit upon which the application is predicated, the Defendants have not established a prima facie case for consideration by the court.

18. In view of this, it is my view that the Defendants have not established an unmistakable right. However, it has emerged from the affidavits filed by both parties that there is a dispute regarding the suit property.

Indeed, it is noteworthy that the Plaintiff is the one who first sought orders from this court which the court granted on 29th November, 2023. It is essential that this dispute be fully heard and a final determination made.

While the dispute is ongoing in court, this court has a responsibility to preserve the subject matter. It is for this reason that the Environment and Land Court Practice Directions allow the court to make orders of status quo.

19. A status quo order was succinctly explained by Muriithi J in the case of; *Mombasa Misc. Civil Application (JR) No.26 of 2010 Republic -vs- The Chairperson Business Premises Rent Tribunal at Mombasa (Bench Mochache) Exparte Baobab Beach Resort (Mombasa Limited) & Monica Clara Schriel* that thus;

“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.”

20. I find that while this matter proceeds it is essential that the status quo be maintained. Status to obtain is that the suit property should not be transferred to any party nor any new construction or demolitions take place on the suit property. The matter to proceed for hearing of the main suit.

21. The court thus makes the following orders;

- a. The status quo outlined above is to be maintained pending the hearing and determination of the suit.
- b. That the matter is to expeditiously proceed for hearing of the main suit.
- c. Costs to abide the outcome of the main suit.

RULING, DATED, SIGNED AND DELIVERED ON 10TH DAY OF JUNE, 2024 VIA MICROSOFT TEAMS.

JUDY OMANGE

JUDGE

In the Presence of: -

-Mr Mumu for Mr. Njoroge for Plaintiff

-Mr. Thuo for Mr. Eredi for Defendant

-No Appearance for the Respondent



-Court Assistant: Steve Musyoki

