



Ndabibi Farmers Company Ltd v Agricultural Development Corporation & 15 others (Environment & Land Case 84 of 2024) [2024] KEELC 5472 (KLR) (Environment and Land) (25 July 2024) (Ruling)

Neutral citation: [2024] KEELC 5472 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIVASHA
ENVIRONMENT AND LAND
ENVIRONMENT & LAND CASE 84 OF 2024**

MC OUNDO, J

JULY 25, 2024

BETWEEN

NDABIBI FARMERS COMPANY LTD APPLICANT

AND

AGRICULTURAL DEVELOPMENT CORPORATION 1ST RESPONDENT

**OBADIAN R.M WAINAINA T/A COUNTRY TRAVEL
MAPS 2ND RESPONDENT**

JOEL KIPKEMBOI YEGO T/A CHALAN ASSOCIATES 3RD RESPONDENT

THOMAS KIPROP KIRUI T/A KIPLAN SURVEYORS 4TH RESPONDENT

THE CHIEF LAND REGISTRAR 5TH RESPONDENT

THE DIRECTOR OF SURVEY 6TH RESPONDENT

THE NATIONAL LAND COMMISSION 7TH RESPONDENT

**HON. KITHURE KINDIKI (ON BEHALF OF MINISTRY OF INTERIOR &
NATIONAL ADMINISTRATION) 8TH RESPONDENT**

INSPECTOR GENERAL OF POLICE 9TH RESPONDENT

GENERAL SERVICE COMMANDANT 10TH RESPONDENT

DIRECTORATE OF CRIMINAL INVESTIGATIONS 11TH RESPONDENT

**MWANA MWIRERI RIRONI & NAIVASHA FARMERS CO.
LTD 12TH RESPONDENT**

BENJAMIN KIPKECH KIPKULEI 13TH RESPONDENT



**JOHN KARANJA KAMAU GEOFFREY KAMUMU GITHUKA PETER
MAINA NDEGWA (SUED AS PURPOTED TRUSTEES OF ‘NEW’ NDABIBI
MUTHAKWA SELF HELP GROUP) 14TH RESPONDENT**

**STEPHEN MWAURA MUNGAI SAMUEL MANG’ATU MASENGO PARRIC
MWANGI NGARUIYA (SUED AS PURPOTED TRUSTEES OF NEW NDABIBI
SQUATTERS SELF HELP GROUP) 15TH RESPONDENT**

THE ATTORNEY GENERAL 16TH RESPONDENT

RULING

1. Before me for determination is a Notice of Motion dated 7th November, 2023, brought pursuant to the provisions of Section 1A, 1B and 3A of the *Civil Procedure Act*, Order 40 Rule 1 and 51 Rule 1 of the Civil Procedure Rules and all enabling provisions of the law wherein the Applicant has sought for a temporary order setting aside the consent orders of Hon. N.S. Lutta in Naivasha Chief Magistrates ELC Case No. E004 of 2022 pending the hearing and determination of the instant suit.
2. That in the meantime there be issued an order of status quo that its members resume farming activities on that whole parcel No. 1695 pending the hearing and determination of the instant suit
3. Lastly the Applicant sought that for costs of the Application be in the cause.
4. The Application was supported by the grounds on its face and the Supporting Affidavit of equal date sworn by Edward R. Maina, who deponed that at all material times to the suit, the Applicant was and is the bonafide owner of 2504 acres of land that had been transferred to it by Colvile Limited on 11th March, 1974 through a Memorandum of Registration of Transfer of Lands in IR 1417.
5. That on 7th August, 2020, the Applicant had through the eCitizen platform, reference Number: 000001-3000458954 successfully applied to pay rent for the disputed land parcel 1695 (suit land) amounting to Kshs. 122,145/= after which it had been issued with a Rent Clearance Certificate in respect of plot No. 1695 up to 31st December, 2020.
6. That the genesis of the Applicant’s ownership of the suit land traced back to the colonial time in the year 1825 when the same had been granted to Gilbert De Preville Colvile wherein a sketch plan No. 2538 of the suit property L.O No 1695 had been prepared and signed by the Director of Land Surveys on 25th June, 2024.
7. That the Applicant had since encountered entities and persons who were not its members intruding and wanting to legitimize their rights of ownership over the suit property by force as opposed to the original list of its members and successors in title.
8. That whereas there had been transfer of whole of the suit land to the Applicant, some Respondents herein now owned part of the said suit land. That on 12th October, 2015, the 6th Respondent had written to the Applicant informing him of the inconsistency between the RIMS it had presented and that which was in the 6th Respondent’s records.
9. That the 2nd, 3rd and 4th Respondents had conducted the sub-division of the disputed parcels from the original parcel 1695 (suit land) without the Applicant’s instructions.



10. That further, on 24th August, 2009, the Director of Criminal investigations, the 11th Respondent had written to the Applicant's firm of Advocates delivering their verdict which questioned the authenticity of the title in possession of the 1st, 12th and 13th Respondents.
11. That despite land parcels L.R 1695/3-1695/18 being part of the whole parcel of the suit land belonging to the Applicants, they had frequent arrests and arraignment for trespass wherein even a whole barracks of General Service Unit was in occupation of the land whereby they had continually inflicted harm to the Applicant's members while carrying out farming on the said parcels L.R 1695/3-1695/18.
12. That a perceived order upon which the officers of the 13th Respondent were acting on had been issued by Hon. N.S Lutta in Naivasha Chief Magistrate ELC Case No. E004 of 2022 as a result of a consent between the Plaintiff and the Defendant, and which order had been granted by a court devoid of jurisdiction, the lands in question being L.R No. 6233 (1856/1) measuring 4792 acres and L.R No. 7281 measuring 2975 acres totaling to around 7000 acres, while the suit land L.R No. 1695 measured 2504 acres.
13. The 12th Respondent, through its Replying Affidavit dated 19th December, 2023 sworn by Benson Karenju Nguku, the overall secretary of the Applicant deponed that the 1st Respondent had sold land to the 12th Respondent between the years 1997 to 2008 wherein a sketch plan dated 29th June 1999 had been prepared by the said 1st Respondent which required to be scrutinized to ascertain its value and functions in the subject land.
14. He deponed that the Deed Plan L.R No. 1695/3-6 original No. (1695/2/1-4) R.I.M SA 37/A 111:D.9 (133/1) & F/R No. 291/35 Location W. of Lake Naivasha which was prepared by the 2nd Respondent in July 1999 and received in the Surveyor of Kenya on 30th July, 1990 was dubious. That further, the Deed Plan registered as L.R No. 7281/1-12 R.I.M SA 37/A 111 D.9 (133/1) & F/R 319/57 AD) Lake Naivasha did not reflect in the amendment done in F/R 291/35 which was prepared by the 2nd Respondent hence a patent irregularity. That the 3rd and 4th Interested parties had presented copies of title deed L.R 1417, L.R No. 1695 reflecting two different entries from I.R No. 1417 which had added entry No. 7 hence the unexplained variance caused injury to the 12th Defendant.
15. That the 1st Respondent had transferred the land to the 12th Respondent but had withheld beacons and demarcation on the ground despite receiving and retaining their money. That the 1st Respondent had been infiltrated by third parties and fraudsters to the extent that there was need for audits, investigation, verification scrutiny to ascertain the genuineness and authenticity whereof. He urged the court to cancel all the title deeds and the boundaries existing until and an authentication and clarity on the records at the 1st respondent and lands office had been done.
16. That it was apparent that the 1st Respondent had either colluded with the other Respondents or entirely abstained from guarding the intrusion of its system from perforation by land fraudsters who had colluded with the officials from the ministry of land, the director of surveyors of Kenya and the other respondent to defraud them through forged documents hence the claims raised should be considered in order to enable the court effectually and completely adjudicate upon and settle all questions involved in the documents.
17. The 1st to 11th Defendants/Respondents and the 13th to 16th Defendants/Respondents did not file any Response.
18. On 20th December, 2023, directions were taken that the instant application be canvassed by way of written submissions wherein only the Applicant had complied and filed its submissions dated 23rd April, 2024 which I shall summarize as hereinunder:



19. The Applicant submitted while reiterating the contents of its Supporting Affidavit that it was a duly registered company via a certificate of incorporation dated 26th May, 1972 and the bonafide owner of all 2504 acres of the suit land the same having been transferred to it by Colvile Limited. That the illegally created parcels L.R 1695/3-1695/18 were part of the suit land No. 1695 and that that the presence of the General Service Unit on parcel L.R 1695/3-1695/18 had caused irreparable harm to its members who could not access the said parcels to attend to their crops.
20. The Applicant placed reliance on the provisions of Order 40 Rule 1 of the Civil Procedure Rules and a combination of decisions in the case of Giella vs Cassman Brown (1973) EA 358 and Nguruman Limited Vs. Jan Bonde Nielsen and 2 Others (2014) eKLR to submitted that they had complied with the principles for the grant of temporary order having established a Prima facie case as held in the case of Mrao vs First American Bank of Kenya Limited & 2 Others (2003) KLR 125.
21. That the presence of the General Service Unit on the illegally created parcel L.R 1695/3-1695/18 which was were part of its suit land No. 1695 had caused irreparable harm to the Applicant's members who could not access the said parcels to attend to their crops and their visit to all relevant government offices had been naught. Reliance was also placed in the decided case of Waithaka v Industrial and Commercial Development Corporation [2001] eKLR to submit that the harm that the Applicant's members had suffered was not compensable by way of damages.
22. That the balance of convenience tilted towards issuing temporary order for status quo so as to preserve the subject matter until the instant matter was heard at a full trial. That whilst the Applicant had laid out its case against the Respondents, none of its averments had been controverted through a response, defence and/or counter-claim hence the instant Application had proceeded undefended. Reliance was paced on the decision in Kenya Power and Lighting Company Limited v Nathan Karanja Gachoka & another [2016] eKLR among others to submit that where evidence was adduced and not controverted, it stood the test.

Determination.

23. I have considered the Application herein as well as the replying affidavit and the submission by Counsel for the applicant herein. I note that the present application has been brought by a Notice of Motion pursuant to the provisions of Section 1A, 1B and 3A of the Civil Procedure Act, which do not give this Court jurisdiction to grant the prayers sought as they are provisions that deal with objective of the Act, the duty of the court and the inherent powers of the court respectively.
24. In the case of Mumias Out growers Company (1998) Ltd –vs- Mumias Sugar Company Ltd NRB HCCC No. 414 of 2008 the court held that when considering an application to set aside and/or vary a consent decree, that:

“The applicant has invoked the inherent jurisdiction of this court. I have always known the law to be that the inherent power of the court cannot be invoked where the rules have provided for the procedure to be followed.”
25. Bosire J (as he then was) in the case of Muchiri –vs- Attorney General & 3 others (1991) KLR 516 stated at page 530 that:-

“Inherent jurisdiction is invoked where there are no clear provisions upon which relief sought may be anchored, or where the invocation of rules of procedure will work an injustice.”



26. Also in Halburys Laws of England 5th edition Vol. II, 2009 paragraph 15, it was observed that:-

“... a claim should be dealt with in accordance with the rules of the court and not by exercising the court’s inherent jurisdiction.....and has been defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary. Where it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent vexations or oppression to do justice between the parties and to secure a fair trial between them.”

27. This said and done and having considered the Applicants’ application, I find two issues herein arising for determination:

- i. Whether the consent order of 6th March 2022 in Naivasha Chief Magistrate ELC Case No. E004 of 2022 can be set aside.
- ii. Whether an order of status quo should issue in relation to parcel No. 1695.

28. I have looked at the impugned order of (date not clear) March 2022 made in Naivasha Chief Magistrates Court in ELC Case No. E004 of 2022 herein annexed as the Applicants’ annexure ANN17 wherein the consent was in relation to subject suit properties known as L.R 6233 (1856/1) and 7281 situated in Naivasha County which properties do not relate to the properties in the present suit described as land No. 1695 or 1695/3-1695/18. Secondly no such circumstances have been shown to exist that suggest fraud or collusion in the consent entered into by the parties therein.

29. In the case of Brooke Bond Liebig (T) Limited vs Mallya (1975) E.A. 266, Law JA, stated the law at P. 269 in these terms:-

“The circumstances in which a consent judgment may be interfered with were considered by this court in Hirani vs Kassam (1952), 19 EACA 131, where the following passage from Seton on Judgment and order, 7th edition, Vol. 1 page 125 was approved;

‘Prima facie, any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and on those claiming under them... and cannot be varied or discharged unless obtained by fraud or collusion, or by an agreement contrary to the policy of the court.... or if consent was given without sufficient material facts, or in misapprehension or in ignorance of material facts, or in general for a reason which would enable the court to set aside an agreement.’

30. The Court of Appeal in the decision in Munyiri –vs- Ndungunya (1985) KLR 370 held as follows:

“..... will exercise its jurisdiction to review, vary or set aside a consent order if it is shown that such an order has been obtained by fraud or collusion, by agreement contrary to the policy of the Court, or the consent was given without sufficient material fact, or misapprehension or ignorance of material facts or for a reason which would enable a court to set aside an agreement or by the consent of the parties themselves.”

31. In the case of Samuel Mbugua Ikumbu v Barclays Bank of Kenya Limited [2015] eKLR the Court of Appeal held that:

“The law on variation of a consent judgment is now settled. The variation of a consent judgment can only be on grounds that would allow for a contract to be vitiated. These



grounds include but are not limited to fraud, collusion, illegality, mistake, an agreement being contrary to the policy of the court, absence of sufficient material facts and ignorance of material facts.”

32. I find that apart from there having been no relation established between the subject suit properties in the impugned order and the current suit herein, there has also not been established sufficient material facts, or misapprehension or ignorance of material facts, or in general for a reason which would enable the Court to set aside the Consent Order. This limb of the Application is denied.
33. On the second limb as to whether the Applicant deserves the order of status quo so that its members resume farming activities on that whole parcel No. 1695 pending the hearing and determination of the instant suit, the Court is bound by the holding in the case of *Mugah –v- Kunga* [1988] KLR 748 where the Court of Appeal had held that in land matters, status quo orders should always be issued for purposes of preserving the subject matter.
34. Indeed the court’s practice directions vide Gazette Notice No. 5178/2014 Practice direction No. 28(k) gives the court the leeway and discretion to make an order for status quo to be maintained until determination of the case.
35. The court has been informed that the Applicants’ members are bonafide members of 2504 acres of land parcel No LR 1695/5, 1695/8-12 and 1695/18 wherein they had been farming and that the court should issue an order of status quo so that the Applicants members can resume their farming activities, pending the hearing and determination of the suit. There has been no contestation by the Respondents. With this in mind, and whilst cautioning myself on the preservation of the status quo so as to ensure that no party is prejudiced, I would therefore interfere in a limited manner by clearly defining the status quo herein to the effect that:
 - i. An order of status quo is herein issued to be maintained by all the parties in that it must be understood that the Applicants’ members shall continue to farm on parcels No LR 1695/5, 1695/8-12 and 1695/18 but not to deal with them adversely.
 - ii. There shall not be interfering with parcels registration No LR 1695/5, 1695/8-12 and 1695/18 by the Respondents.
 - iii. Such status quo is to be maintained by all parties until the matter is finally heard and determined.
 - iv. The cost of the application dated the 7th November, 2023 shall be in the cause.

DATED AND DELIVERED VIA TEAMS MICROSOFT AT NAIVASHA THIS 25TH DAY OF JULY 2024.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE

