



REPUBLIC OF KENYA



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**Mwataamu & 3 others v Carlita Limited & 4 others (Environment & Land
Case E006 of 2023) [2024] KEELC 5447 (KLR) (22 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 5447 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
ENVIRONMENT & LAND CASE E006 OF 2023**

AE DENA, J

JULY 22, 2024

BETWEEN

**ATHUMANI JUMA MWATAAMU 1ST PLAINTIFF
ALI JUMA MWATAMU 2ND PLAINTIFF
ESTHER GLORIA MWIHAKI 3RD PLAINTIFF
SEAS INVESTMENT LIMITED 4TH PLAINTIFF**

AND

**CARLITA LIMITED 1ST DEFENDANT
VICTOR KARIUKI GATONYE 2ND DEFENDANT
DIANI SQUARE LIMITED 3RD DEFENDANT
THE CHIEF LAND REGISTRAR KWALE 4TH DEFENDANT
THE ATTORNEY GENERAL 5TH DEFENDANT**

RULING

Introduction

1. The court is tasked with determination of two applications dated 17/7/2023 by the Plaintiffs and 31/8/2023 by the 2nd and 3rd Defendants.

Plaintiffs' Application

2. The application dated 17/7/2023 seeks the following prayers before court; -
 - a.. Spent



- b. . That pending hearing and determination of this application inter parties, a temporary injunction be issued restraining the Respondents/Defendants their agents, servants, employees, proxies and/or assigns from trespassing and or encroaching on all those parcels of land known as land reference numbers Kwale/Diani Beach Block/1168-1221.
 - c. . That subsequent to the hearing and determination of this application and pending hearing and determination of this suit, a prohibitive injunction be issued restraining the Respondents/Defendants, their agents, servants, employees, proxies and/or assigns from selling, trespassing, encroaching, grabbing or whatsoever dealing with all those parcels of land known as Kwale/Diani Beach Block/1168-1221.
 - d. . That a prohibitive injunction be and is hereby issued restraining the 2nd and 3rd Defendants from demolishing or in any way interfering with the structures encompassing and situated in all those parcels of land known as land reference Kwale/Diani Beach Block/1168-1221 occupied by the Plaintiffs until this suit is heard and determined.
 - e. . That consequent to the grant of the prayers above the Honourable court be pleased to issue such further directions and orders may be necessary to give effect to the foregoing orders and/or favour the cause of justice.
 - f. . That the parties be at liberty to apply for any other order or direction to enable cause of justice.
 - g. . That the costs of this application be provided for.
3. The application is premised upon grounds on its face and the supporting affidavit of Esther Gloria Mwihi. The deponent avers that she is the Director of Seas Investment Limited the 4th Applicant/Plaintiff herein. It is averred that the 1st to 4th Plaintiffs/Applicants are the legitimate owners of land reference no Kwale/Diani Beach Block/1204, 1210, 1212, 1213, 1214, 1215, 1216, 1217, 1218, 1219 and 1220 which all emanate from the subdivision of Kwale/Diani Beach Block/1166. The titles were attached. That Kwale/Diani Beach Block/1166 resulted from the amalgamation of land reference number Kwale/Diani Beach Block/155,157 and Kwale/Diani Beach Block/346 over 30 years ago and does not exist.
4. It is stated that approvals for development of the suit properties were obtained from the relevant authorities after which the Applicants mobilised resources including construction materials and commenced development in March 2021. That it is then that the 3rd Defendant accompanied by police from the Diani Police Station invaded the construction site and stopped construction. That the Respondents further hired goons and have taken possession of the property to date hence necessitating the instant application.
5. It is further deponed that parcel 155 does not even exist on the cadastral map which map was attached. At paragraph 15 the eviction of the Plaintiffs and occupation by the Respondents is termed illegal null and void. That no eviction notices were ever issued before the alleged illegal occupation. The Applicants are apprehensive that in the event the orders sought are not granted, they are bound to suffer irreparable loss that cannot be compensated by way of damages.

Respondents' Response

6. The 2nd and 3rd Defendants filed a replying affidavit to the application as sworn by the 2nd Defendant Gatonye Victor Kariuki. The 71 paragraphed affidavit denies the averments raised in the application and state that the alleged consolidation and amalgamation of the three suit properties to form LR Kwale/Diani Beach Block/1166 is fraudulent. The said amalgamation is disputed for reasons that



Kwale/Beach Block/155 is registered in the names of the 3rd Defendant being Diani Square Ltd. A copy of the said title was annexed. Further that the parcels Kwale/Diani Beach Block 346 and 157 belong to one Mr. Amar Kalsi the owner of Swahili Beach Resorts Ltd and on which the resort is erected and has been in the danger of being grabbed by people using the Plaintiffs tactics.

7. The deponent states that there have been various attempts to grab Kwale/Diani Beach Block/155,157 and 346. According to the deponent, he purchased Kwale/Diani Beach Block/155 after due diligence. That the land was previously owned by one Merryn Eversfield James Morgan who on 11/11/1985 surrendered the lease back to government after having leased the same for 34 years. That the government then leased the land and to Dee Dee Investment in the year 1988 and who transferred the land to Cherutelel Hotel Management Gesselschaft Ltd. That the said company later transferred the land to Waterfront Hospitality Ltd which was then charged to Diamond Trust of Kenya on 23/2/1995 to secure a loan of Kshs. 15,000,000/= which was sold upon default to the 1st Defendant herein.
8. It is stated that the initial lease to the property is to run to the year 2078 and there is absolutely no way the Plaintiffs would have been registered as owners before lapse of the lease.

Respondents' Application

9. The application dated 31/8/2023 as filed by the 2nd and 3rd Respondents is for the following prayers; -
 1. Spent
 2. Spent
 3. That jurisdiction is everything and without it a court of law cannot lawfully make one more step.
 4. That in furtherance of the above, appropriate directions be granted by this Honourable court.
 5. That upon hearing this application interpartes, this Honourable court be pleased to dismiss with costs the current proceedings the same having been filed in stark and blatant violation of the principles of res judicata and are therefore a nullity, a gross abuse of due process and ought to be dismissed with costs forthwith.
 6. That arising from the above, this Honourable court does not have any jurisdiction to hear and determine anything in this matter and therefore the entire proceedings should be dismissed with costs forthwith.
 7. That any further and in the alternative but without prejudice to the foregoing, these proceedings be struck out with costs as they are accompanied by obviously false verifying affidavits.
 8. That costs of this application be provided for.
 9. That the Honourable court be pleased to grant any other order[s] as will be expedient in the interest of substantive justice.
10. The application is set upon several grounds listed on its face and supporting affidavit sworn by Gatonye Victor Kariuki the 2nd Defendant. It is averred that the issues raised in the instant suit were determined with finality by the Mombasa ELC Court in ELC No 23 of 2020 Diani Square Limited versus Jacqueline Lepele & Others. A copy of the judgement to the said case was attached. That in the said judgement it has been established as to who the legal owner of Kwale/Diani Beach Block/155 is. That a decree was issued on 25/11/2021 and subsequently eviction orders were issued on 29/7/2022. It is



stated that pursuant to this revelation, this court does not have jurisdiction to determine the instant dispute as per the provisions of section 7 of the *Civil Procedure Act*. The deponent states that this court cannot seat on the decision made in the former suit as an appellate court. On 4/4/2023 the Applicants herein filed an application to set aside the judgement in ELC No 23 of 2020. The suit herein is termed as forum shopping by the Plaintiffs and the court is urged to dismiss the same.

11. It is further stated that during the pendency of this suit, the Plaintiffs filed another suit being ELC E028 of 2023 which was later withdrawn. The court is asked to allow the defendants application as prayed.

Plaintiffs' Response

12. The application is further opposed by a replying affidavit sworn by Esther Gloria Mwhaki the 3rd Plaintiff and director of the 4th Plaintiff. It is averred that the application is misguided and made in bad faith with the aim of further delaying the instant suit. It is stated that the issues raised relate to whether Kwale/Diani Beach Block/155 should continue to exist and be owned by the 3rd Defendant after consolidation with Land reference number Kwale/Diani Beach Block/157 and 346 to form Kwale/Diani Beach Block/1166. That these issues have never been determined by the court or any tribunal. That for the said reason the suit does not qualify to be struck out as per the doctrine of res judicata as the reliefs sought in Mombasa ELC 23 of 2020 are totally different from what is at stake herein. It is further stated that Kwale ELC No E028 of 2013 was withdrawn on 10/7/2023. That the instant suit was then filed on 17/7/2023 and not 24/7/2023 as alleged. The deponent denies the assertion that there has been previous litigation between the parties herein. It is further averred that judgement in Mombasa ELC No 23 of 2020 was obtained exparte. The court is urged to disallow the application and for the same to be dismissed with costs.
13. The Respondents filed a further affidavit in opposing the application as sworn by the 1st Plaintiff Athuman Juma Mwatamu who avers that it is not in dispute that the Plaintiffs are the owners of land Parcel No Kwale/Diani Beach Block/1204-1219 and 1920. He reiterates the averments by the 3rd Plaintiff in her affidavit as to the existence of Kwale/Diani Beach Block/155. It is stated that this particular parcel ceased existing in the year 1997 before the 2nd and 3rd Respondents were purportedly issued with a title deed. That immediately after consolidation, the Director of Survey proceeded to amend the map and had the 2nd and 3rd Respondents been vigilant in conducting proper due diligence they would have realised the said parcel does not exist. That the purported resuscitation of the said title is fraud and so is the title issued to the 2nd and 3rd Defendants on 9/4/2010. It is also stated that the suit herein does not involve Swahili Beach Resort Limited as they are not a party.
14. The 1st Plaintiff states that bearing in mind the title for Title No 155 did not exist in the year 1997, there is absolutely no way in which there would be a title to take a bank loan. Further that had DTB Bank sold through an auction the land to the 1st Defendant whom the registrar of company states does not even exist, then there would be vesting orders having been issued by the court. That no copy of the advertisement for sale was further annexed. It is stated that the Plaintiffs have annexed copies of documents in evidence of amalgamation of the suit properties alluded to and which include consent from the Kwale County Council dated 17/7/1995. In reference to the proceedings in ELC No 23 of 2020 it is averred that no evidence has been tendered before court indicating that the Plaintiffs therein were in anyway related to the Plaintiffs in this suit. That from the records, the Plaintiffs in the former suit were deceased individuals. The court is urged to dismiss the Respondents application and to allow the application earlier filed by the Plaintiffs.
15. In opposing the application, the Attorney General filed grounds of opposition before court on 4/12/2023 and raised the following verbatim grounds;



1. That the application offends Article 162[2] of *the Constitution* of Kenya and Section 13[2] of the Environment and *Land Act* No 19 of 2011.
2. That the suit does not in any way offend Section 7 of the *Civil Procedure Act* Cap 21 of the laws of Kenya.
3. That for the principles set out in Section 7 of the *Civil Procedure Act* to apply there has to be a previous suit in which the matter was the same as the current, same parties litigating under the same title.
4. That the dispute relates to properties LR No Kwale/Diani Beach Block 1168-1221 and not Kwale/Diani Beach Block/ 155 hence it relates to different suit property and thus qualifies to be before this court.
5. The application goes against the elements of the doctrine of res judicata as was discussed in the Supreme Court case of *John Florence Maritime Services Limited & Another V Cabinet Secretary Transport and Infrastructure & 3 Others* [2021] eKLR.

Submissions

16. The applications were canvassed by way of written submissions which parties filed and exchanged. I have considered the said submissions, the evidence on record and the authorities cited.

Analysis and findings

17. I have perused both applications as filed by the parties herein. I must admit that both applications are highly contested. I am further alive to the fact that a plea of res judicata has been raised by the 2nd and 3rd Defendants as against the present suit. While I note that there are two applications the subject of this ruling and the issues raised in both applications overlap to a large extent, the plea of res judicata must be addressed first. A determination of the application for injunction is dependent upon this court's finding. Should this court find that the present suit is res judicata Mombasa ELC No. 23 of 2020, there will be no need to consider the application as the court must down its tools and not proceed any further. The court draws guidance from the case of *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] Eklr.
18. The doctrine of res judicata has its genesis in Section 7 of the *Civil Procedure Act*, Cap. 21 of the Laws of Kenya which provides that -

No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally decided by such court.

19. The gist of Section 7 of the *Civil Procedure Act* defines the principle of res – judicata to apply where the issues in the previous suit ought to have been “heard and finally decided.” The Black’s Law Dictionary 10th edition defines the terms “heard and determined” as follows: -

“Of a case, having been presented to a Court that rendered Judgment.”



The term “hearing” is defined in the same dictionary as follows: -

“A judicial session usually open to the public held for the purpose of deciding issues of fact or of law sometimes with witnesses testifying.”

20 . In the decided case of *John Florence Maritime Services Limited & Another vs Cabinet Secretary for Transport and Infrastructure & 3 Others* [2015] eKLR the essence of the doctrine of res judicata was expounded as follows: -

“The rationale behind res-judicata is based on the public interest that there should be an end to litigation coupled with the interest to protect a party from facing repetitive litigation over the same matter. Res-judicata ensures the economic use of court’s limited resources and timely termination of cases. Courts are already clogged and overwhelmed. They can hardly spare time to repeat themselves on issues already decided upon. It promotes stability of judgments by reducing the possibility of inconsistency in judgments of concurrent courts. It promotes confidence in the courts and predictability which is one of the essential ingredients in maintaining respect for justice and the rule of law. Without res judicata, the very essence of the rule of law would be in danger of unravelling uncontrollably.”

21 . The Court of Appeal in the case of *The Independent Electoral and Boundaries Commission v Maina Kiai & 5 others*, [2017] eKLR), espoused the factors to be considered in defence of res judicata;

“For the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in disjunctive but conjunctive terms;

- a. The suit or issue was directly and substantially in issue in the former suit.
- b. That former suit was between the same parties or parties under whom they or any of them claim.
- c. Those parties were litigating under the same title.
- d. The issue was heard and finally determined in the former suit.
- e. The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.”

22 . Applying the above principles to the present case I will proceed to discuss whether the present suit is res judicata.

23 . The former suit is pleaded to be Mombasa ELC No 23 of 2020 and whose judgement was delivered on 23/9/2021 by my brother Yano J. The judgement was presented by the Defendants and which I have carefully read. The suit was commenced by way of Plaint and was largely for eviction of a number of traders which the Plaintiffs alleged were occupying the suit property Kwale Diani Beach Block /155 registered under the Plaintiffs name. It was alleged that despite several notices to the said traders they had refused to vacate and were intent on occupying the premises in perpetuity. The Plaintiff prayed for their eviction including demolition of the Defendants structures and vacant possession, damages for trespass, Mesne profits and costs of the suit.

24 . I note that the suit proceeded for hearing by way of formal proof following failure by the Defendants to enter appearance or file defence service. This suffices as a response for consideration for the reason



the court heard the Plaintiffs and rendered judgement based on the evidence tendered. Based on the title produced and which I believe is the same title produced in these proceedings and applying the provisions of section 26 of the Land Registration Act the court made a finding that the certificate of title produced by the Plaintiff showing its interest as the proprietor of the suit property is prima facie conclusive evidence as to the ownership of the suit property. The court proceeded to grant orders as prayed except mesne profits and a decree issued appropriately.

25. With regard to the instant suit, I note that the subject suit property in the former suit is Kwale/Diani Beach Block/155 and which in the instant suit is claimed to be non-existent. It is noted that the Plaintiffs herein aver that the suit parcel in the former suit forms part of an amalgamation made with other parcels to give rise to one property being Kwale/Diani Beach Block/1166. In addition, there are emerging allegations of fraud which were never raised in the former suit and were not an issue. I have noted the analysis given by the Defendants but it is my view most of the issues raised are issues touching on the merits of the case that can only be ascertained at full trial and not at interlocutory stage. I will steer off the merits of the present suit. It is evident that the issues raised in the present suit were never the subject matter in the former suit and were never determined by the court as alleged by the Defendants herein. The finding of this court is that the issues in the present suit are not directly and substantially the same issues in Mombasa ELC No 23 of 2020.
26. On whether the former suit was between the same parties or parties under whom they or any of them claim. I have noted the parties in Mombasa ELC No 23 of 2020 and specifically the Defendants are not the Plaintiffs in this suit. The Defendants therein appear to be individuals trading in the said property. The named individuals are the only ones affected by the judgement in the former suit. The only party named in the suit herein and who was also a party in the former suit is the 3rd Defendant Diani Square Limited.
27. Were the parties litigating under the same title? The Defendants contention is that the Plaintiffs in this suit are seeking cancellation of the title Kwale/Diani Beach Block/155 which was the subject of the proceedings in Mombasa ELC No 23 of 2020. My understanding of the Plaintiffs argument is that the said orders for cancellation are being sought for the reason that the said property allegedly ceased to exist by dint of the alleged consolidation among other grounds touching on its allegedly illegal and fraudulent revival. Of importance to me is that there exists titles LR No Kwale/Diani Beach Block 1168-1221 and which are the ones in dispute in the current proceedings albeit the alleged connection to Kwale/Diani Beach Block/ 155. Prima facie the court must treat the title holders as owners unless proved otherwise and this must await a determination on merits.
28. In view of the above findings I will not delve into a discussion of the rest of the requirements except to note that the Court in Mombasa was seized with jurisdiction to hear the suit for eviction.
29. Based on the foregoing it is my finding that the present suit is not res judicata and it is properly before court.
30. The second limb of the application sought for the striking out of the Plaintiffs suit as being a nullity in law for being accompanied by false replying affidavit in violation of Order 4 Rule 1(1)(f) and 4 Rule (1)(2) of the *Civil Procedure Rules*. What do these provisions stipulate?

29 Order 4 is on Plaintiff and sets out particulars thereof and states: -

1. The plaintiff shall contain the following particulars
 - a.
 - b.



f) An averment that there is no other suit pending, and that there has been no previous proceedings, in any court between the Plaintiff and the defendant over the same subject matter and that the cause of action relates to the Plaintiff named in the Plaintiff.

2. The Plaintiff shall be accompanied by an affidavit sworn by the Plaintiff verifying on the correctness of the averments contained in rule 1(1) (f).

30. The court has noted the averments in this regard on the part of the 2nd and 3rd Defendants. This revolves around the failure of the Plaintiffs to disclose the filing and withdrawal of Kwale ELCC No. E028 of 2023. It is submitted by the Defendant that Esther Gloria Mwhaki the Director of the 4th Plaintiff has committed the offence of perjury. The main contention is as to whether the withdrawal of the said suit predated the filing of the present suit otherwise it would mean that it was existing and pending and ought to have been disclosed. It is my view that even if the suit was withdrawn before filing, it would still qualify as previous proceedings warranting disclosure. Granted that the pendency of the suit may not have been disclosed what would be the consequences for such non-disclosure?

31. It is noteworthy that all the requirements are mandatory as the word ‘shall’ has been deployed. However, Subrule 4(6) is to the effect that;-

The court may of its own motion or on the application by the plaintiff or the defendant order to be struck out any plaint or counterclaim which does not comply with sub- rule (2)(3) and (5) of this rule.

32. My considered interpretation of the above provision is that the court has been granted the discretion to either strike out the pleading or not. I have read the authorities in support of striking out the plaint and specifically the ruling by *G.E.O Tunya J in Kitur & Another Vs. Standard Chartered Bank & 2 Others* (2002) eKLR and *J.W.O. Otieno in Kenya Airports Authority Vs Queen Insurance Agency* (2001) eKLR. The other decided cases I note also adopted the same reasoning. It is noteworthy that these are persuasive and are not binding decisions upon this court.

33. Striking out of pleadings is a draconian move and the courts are enjoined where possible to sustain a pleading rather than striking it. The essence of a verifying affidavit and the consequences of its striking out were explained by the Court of Appeal in *Josephat Kipchirchir Sigilai v Gotab Sanik Enterprises Ltd & 4 others* [2007] eKLR as follows: -

“An affidavit, as a general rule, is evidence. It would appear to us that the affidavit is intended to make the plaintiff own every averment in his plaint. It was intended to change the averments in the plaint from being mere averments or pleadings into evidence as is true in other modes of instituting suits and to pin down the plaintiff to them and thus make them part of evidence in support of his case; and possibly to limit room for manoeuvre... A verifying affidavit as envisaged by the rule, is meant to assert or vouch to the truth of what is stated therein.”

The Court further expressed itself as follows –

“We think an omission to fully comply with the provision is a mere irregularity which, except in very clear cases, may be cured. We agree with Mr. Onyinkwa for the appellant that striking out a suit is a draconian and extreme measure which should only be resorted to in the clearest of cases, where the court, after considering all the facts and circumstances of the case comes to the inescapable conclusion that the plaintiff is abusing the court process or his claim is frivolous or vexatious or scandalous or does not lie.”



34. Each case must be decided based on its facts and merits. Looking at the plaint herein there are triable issues that warrant the courts consideration on merit rather than shutting the Plaintiffs from the seat of justice. I have noted the 2nd & 3rd Defendants robust submissions analysing the evidence adduced in the affidavits and annexure's aimed at demonstrating the Plaintiffs claim as a sham. But all these are matters that ought to be tested at final hearing on merit and cannot be a basis for concluding that the plaint is frivolous or vexatious or scandalous or discloses no reasonable cause of action. As a court I'm far from being convinced that substantive justice will be served by striking out the plaint. What has happened can still be taken into consideration and tested during the pendency of the proceedings in cross examination. In my view the fact the court exercises its discretion to go for the merits of the case is not a bar for the Defendants to test credibility of the witnesses. It is also not a bar for consideration by the court in the rendition of its judgement in this matter. Consequently, I decline to strike off the verifying affidavit but retain the issue for further consideration when rendering the judgement herein.
35. In view of the finding above, the court now embarks on the determination of the prayers for a temporary injunction and prohibitive injunction sought by the Plaintiffs. From a quick consideration of the pleadings I gleaned the undernoted issues would finally require determination.
1. What is the history on ownership of the suit property [properties]?
 2. Whether the properties Kwale/Diani Beach Block/155,157 and 346 were amalgamated to form parcel Kwale/Diani Beach Block/1166 which was later allegedly subdivided into Kwale/Diani Beach Block/1204, 1210, 1212, 1213, 1214, 1215, 1216, 1217, 1218, 1219 and 1220.
 3. Whether the alleged amalgamation never took place and the suit property herein is still registered as Kwale/Diani Beach Block/155 with Kwale/Diani Beach Block 157 and 346 being distinct and separate properties.
 4. Is there any fraud with regard to the suit property and who between the parties herein perpetrated the same bearing in mind that there are separate titles held by the parties herein as proof of ownership?
35. Clearly the above issues are highly contentious and cannot be unbundled at interlocutory stage. In order to better place the court into a clearer view on what was on the ground for purposes of the application for injunction, a site visit was undertaken by the court on 1/3/2024. The Deputy Registrar ELC filed 'Amended Site Visit Report' before court on 14/3/2024. The court had hoped that the application could be compromised by recording appropriate status quo orders. At page 17 of the report, the Deputy Registrar gives a summary of the courts observation and states at 17(c) that;-
- Both the Plaintiffs and the 3rd Defendant are in occupation of the land. Some of the plaintiffs are physically residing on the land together with the people they have sold the land or permitted access. The 3rd Defendant on the other hand has presence of the land through his three Masai guards.”
- As such, the court is well aware that any orders granted at this stage will have an effect on either parties.
36. With the above in mind, this court opines that status quo orders will suffice in the instant suit pending the hearing and determination of the same. The Black's Law Dictionary, Butter Worth's 9th Edition, defines status quo as a Latin word which means 'the situation as it exists'. The purpose of an order of status quo has been articulated in many court case as highlighted here below;-



37. In the case of *Kenya Airline Pilots Association (KALPA) v Co-operative Bank of Kenya Limited & another* [2020] eKLR, the court stated:

“... 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.”

38. In the case of *Fatuma Abdi Jillo v Kuro Lengesen & another* [2021] eKLR. In *Republic Vs National Environment Tribunal, Ex-parte Palm Homes Limited & Another* [2013] eKLR, Odunga J [as he then was] quotes various decisions in a bid to distinguish status quo from injunctive orders, 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 Vs Nic Bank Limited & another* [2020] eKLR, 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) 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.” *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.”

39. Having established that the parties herein are both in occupation of the suit property, it is proper that the court seeks to establish who should be rightfully in occupation of the same and this can only be through substantive hearing of both parties by viva voice evidence.

40 The following orders shall therefore issue to dispense of both applications dated 17/07/23 and 31/8/23.

i. The application dated 31/8/23 is dismissed.



- ii. Pending the hearing and determination of this suit the Status quo be maintained on the suit property/properties herein. For the avoidance of doubt the status quo is as described by the Deputy Registrar that “Both the Plaintiffs and the 3rd Defendant are in occupation of the land. Some of the plaintiffs are physically residing on the land together with the people they have sold the land or permitted access. The 3rd Defendant on the other hand has presence of the land through his three Masai guards.”
- iii. Additionally, there shall be no demolition, new construction or continuing construction of whatsoever nature on the suit property/properties herein.
- iv. The Parties shall comply with the requirements of Order 11 within 30 days of the date of this ruling.
- v. Costs shall abide the outcome of the main suit.

It is so ordered.

RULING DATED SIGNED AND DELIVERED THIS 22ND DAY OF JULY 2024.

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A.E DENA

JUDGE

Ruling delivered virtually through Microsoft teams Video Conferencing Platform in the presence of: -

Mr. Mwangi Gitau holding brief for Mr. Mwaniki Gitahi Omondi for the Plaintiffs in ELCLC E006 of 2023.

No appearance for the 1st Defendant in ELCLC E006 of 2023.

Mr. Aduda for the 2nd and 3rd Defendants in ELCLC E006 of 2023.

Ms. Mkabane holding brief for Mr. Mungai for the 1st, 2nd and 3rd Interested Parties

Mr. Kipkoech holding brief for Mr. Chimera for the 1st and 2nd Plaintiffs in ELCC 9 of 2023

Ms. Barasa for the 2nd Defendant in ELCC 9 of 2023(Swahili Beach Resort Limited)

No appearance for the Attorney General.

Mr. Daniel Disii - Court Assistant.

