



REPUBLIC OF KENYA



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**Kemei v Keronei & 4 others (Environment & Land Case E019 of 2023)
[2024] KEELC 6117 (KLR) (24 September 2024) (Ruling)**

Neutral citation: [2024] KEELC 6117 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT & LAND CASE E019 OF 2023
JM ONYANGO, J
SEPTEMBER 24, 2024**

BETWEEN

RAEL MORAA KEMEI PLAINTIFF

AND

RICHARD KIMUTAI KERONEI 1ST DEFENDANT

MARTHA TUWEI 2ND DEFENDANT

ELY KIPTANUI 3RD DEFENDANT

PETER KIPCHIRCHIR SEGO 4TH DEFENDANT

EZEKIEL KIPRONO 5TH DEFENDANT

RULING

1. The Defendants/Applicants filed the Notice of Motion dated 24th May, 2024 seeking the following orders:
 - a. Spent
 - b. That the Honourable Court be pleased to set aside, and/or vary the order issued on 20th April, 2023 and a status quo order be issued pending hearing and determination of this suit.
 - c. That costs of this application be provided for.
2. The grounds in support of the application are set out on the face of it, and in the Supporting Affidavit of Peter Kipchirchir Sego, the 4th Defendant, sworn on 24th May, 2024. He deponed that the Plaintiff did not serve them with the pleadings and/or hearing date for the Application which resulted in the order issued on 20th April, 2023. He explained that the Plaintiff vide letter dated 21st March, 2023 informed them that she had obtained an injunction that she would serve through the Chief. That a Chief has no power to serve court orders, and further, no Chief served them nor were they served at all.



- He deponed that they have been on the suit property since birth and that their mother built each of them a house thereon and gave them each 2 Acres. That they settled on the land and one of the terms was that they cannot be removed without a hearing.
3. The 4th Defendant deponed that the land was purchased by their father using his own resources from their uncle, one Subei Kemei. He averred that the Plaintiff's Affidavit of 17th March, 2023 cannot support grant of an injunction, for among other reasons, the fact that an injunction cannot stop that which has already happened thus enforcement thereof amounts to eviction. He deponed that the order obtained on 12th April, 2023 is irregular and asked instead that the status quo be maintained pending hearing and determination of the suit. further, that the court did not enjoin Langas or Simat police station and that their involvement without a court order was an abuse of court process. He asked that the order be set aside as it was obtained fraudulently.
 4. In response, the Plaintiff filed a Replying Affidavit dated 26th May, 2024 where she deponed that when the suit was filed, all the Defendants were served and entered appearance individually on 6th April, 2023. She deponed that the court fixed the inter partes hearing for 13th April, 2023 but they failed to attend court. That the Defendants' advocate arrived in court at 11.00am when the orders had already been granted. She deponed that the allegation of non-service is an abuse of the court process, and added that the court already issued an order of status quo, which is what the Defendants are asking since the Defendants were indeed each given 2 acres where they have settled and are utilizing. She explained that she has been utilizing the 8.5 Acres which the court gave her. That the court never gave an injunction to remove anybody but to be where they are, which is why no houses were demolished or any portion of the land recovered.
 5. The Plaintiff further explained that she planted maize on 6 Acres of her land but the 2nd Defendant allowed her donkeys to eat the maize on 1.5 Acres thereof. She deponed that the Chief and Police are Government officers who are occasionally used to serve court documents which he actually did since the Defendants managed to enter appearance. That she occupies only 8.5 Acres which does not prejudice anybody while the Defendants occupy the 2 Acres she assigned to each of them which will remain so until the matter is heard and determined. The Plaintiff deponed that the O.C.P.D Langas Police Station stepped in to advise the Defendants as a result of which they obtained Counsel to represent them in this suit. The Plaintiff averred that the Defendants' conduct is what necessitated this suit. She added that the 4th Defendant had no authority to plead for the rest of the Defendants thus the Supporting Affidavit is defective and must fail in its entirety.

Defendants/Applicants' Submissions

6. On 4th October, 2023 the court issued directions that the parties file written submissions on the application. In compliance, the Defendants filed submissions dated 8th January, 2024 where Counsel set out a summary of the Defendants' case herein. Counsel then submitted that Section 63(e) of the *Civil Procedure Act* mandates the court to make such interlocutory orders as may appear just and convenient. Counsel explained that the order restrains the Defendants from inter alia interfering with the Plaintiff's land being Kapsaret/Simat Block 2(Simat)/49 (the suit property). He submitted that the Plaintiff admitted in her Affidavit that the Defendants each occupy 2 Acres that were assigned to them and therefore there is need to review the order to allow the Defendants occupy the suit property pending hearing and determination of the suit.
7. Counsel opined that any order to the contrary will in effect evict them from the land before they are heard. He relied on *Tatecho Housing & Cooperative Sacco Society Limited v Quetun Sacco Ltd* (2021) eKLR where the court declined to grant injunctive orders that were in effect eviction orders. Counsel submitted that the injunction is being misapplied to cause injustice to the Defendants before they are



heard and there's is need to substitute it with an order of status quo pending hearing and determination of the suit.

Plaintiff/Respondent's Submissions

8. In the Plaintiff's submissions dated 17th February, 2024 Counsel submitted that the Plaintiff is the legal and registered owner of the land in question and holds title thereto having bought it herself. He cited the right to own property guaranteed at Article 40 of the Constitution of Kenya. He also submitted that under Section 26 of the Land Registration Act (LRA) a title document issued by a land registrar is to be taken as prima facie proof of absolute ownership. That it can only be challenged if it was acquired by fraud, misrepresentation, illegality or through a corrupt scheme. Counsel submitted that Section 26 of the LRA is a replica of Section 23(1) of the Registration of Titles Act and is meant to fortify the doctrine of sanctity of title, which the state guarantees. He argued that the order granted by this court was to protect the Plaintiff's legally acquired property from trespass by the Defendants, whom she had already apportioned land and settled them on part of the said land, but who now seek to disturb her enjoyment of the remainder thereof.
9. On issuance of the order of status quo, Counsel submitted that the order the Defendants seek to set aside is in essence an order of status quo, making this application a waste of judicial time. Counsel relied on Muchanga Investments Ltd v Safaris Unlimited (Africa) Ltd & 2 Others (2009) eKLR and Ashmore v Corp of Lloyds (1992) 2 All ER 486 on the importance of management of judicial time. He urged the court to uphold its initial order. For wasting the court's time, Counsel submitted that the Defendants ought not be rewarded and asked that they be ordered to bear the costs of the Application.

Analysis and Determination

10. I have considered the Application and the Supporting Affidavit herein, as well as the Replying Affidavit and the rival submissions filed by the Counsel on behalf of their respective Clients. I find that the only issue for determination is whether the court should set aside and/or vary its orders of 20th April, 2023 and substitute it with an order of status quo pending hearing and determination of the suit.
11. In asking the court to vary or set aside the order issued on 20th April, 2023 the Defendants are in essence seeking review of the said orders. The substantive law on review is Section 80 of the Civil Procedure Act which reads:-
 - “ 80. Review
Any person who considers himself aggrieved—
 - (a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
 - (b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”
12. Indeed, the Application was brought under various legal provisions, among them Order 45 of the Civil Procedure Rules which sets out the procedure for review. In particular, Order 45 Rule 1(1) provides:
 - “ 1. Application for review of decree or order [Order 45, rule 1]
 - (1) Any person considering himself aggrieved—



- (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
- (b) by a decree or order from which no appeal is hereby allowed,

and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.”

13. The above provision lays out the grounds on which a court may review its own decision, which grounds have been reiterated in numerous authorities, see [Republic v Public Procurement Administrative Review Board & 2 others](#) [2018] e KLR where it was held that:-

“Section 80 gives the power of review and Order 45 sets out the rules. The *rules* restrict the grounds for review. The rules lay down the jurisdiction and scope of review limiting it to the following grounds; (a) discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made or; (b) on account of some mistake or error apparent on the face of the record, or (c) for any other sufficient reason and whatever the ground there is a requirement that the application has to be made without unreasonable delay.”

14. The Defendants herein have not claimed that there has been an error on the face of the record, neither have they alleged the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within their knowledge. From Order 45 Rule 1 above however, an Application for review may be allowed for any other sufficient reason. In [Sbanzu Investments Limited v Commissioner for Lands](#) (1993) eKLR the Court of Appeal discussed what is meant by the term “any other sufficient reason”, explaining that:-

“In *Wangechi Kimita & Another v Mutahi Wakabiru* CA No 80 of 1985 (unreported) it was held that;

“any other sufficient reason need not be analogous with the other grounds set out in the rule because such a restriction would be a clog on the unfettered right given to the court by Section 80 for the *Civil Procedure Act*. The court further went on to hold that the other grounds set out in the rule did not in themselves form a genus or class of things with which the third general head could be said to be analogous. The current position would, then, appear to be that the court has unfettered discretion to review its own decrees or orders for any sufficient reason.”



15. The correct position appears to be that the court has unfettered discretion to review its own decrees or orders for any sufficient reason. The Defendants herein had alleged in their supporting affidavit that the order was obtained by fraud. However, no proof of such fraud was presented to this court.
16. The other ground raised by the Defendants is that they were never served with the Application herein. When the matter first came before the Court on 20th March, 2023 the court issued an ex-parte injunction and ordered the Plaintiff to serve the Defendants with the application. The Application was then fixed for inter-partes hearing on 13th April, 2023. On the date of hearing of the application inter-partes, the Defendants had all entered appearance in the suit but had not filed any response to the application, which Counsel for the Plaintiff informed the court as much. Counsel also informed the court that the Defendants were absent from court despite being served. He then asked the court to allow the Application as it was undefended.
17. Consequently, the Court allowed the application as prayed. The order given on 13th April, 2023 and issued on 20th April, 2023 reads:
- “(a) The Defendants/Respondents, children, employees, their agents, servants and other persons whosoever acting on their behalf and or directions be and are hereby restrained by way of temporary injunction from trespassing, encroaching, ploughing, leasing, threatening any persons and or lessees acting on the Plaintiff’s instructions and or otherwise interfering with the Plaintiff’s portion of 8.5 Acres in her own land parcel No. Kapsaret/Simat Block 2(Simat)/49 pending the hearing and determination of the suit.”
18. I have perused the court file and note that there is no return of service to show that the ex-parte Order herein, on which the hearing date for the application was endorsed, was served on the Defendants. The only proof of service is on all the 5 Summonses to Enter Appearance returned to this court, which at back thereof all bear the endorsement “Received by Mary from Chemwok Advo on 27th March, 2023”. I note that they had entered appearance on 6th April, 2023 and must have been aware of the existence of the suit well before the date of the hearing of the Application interpartes. However, knowledge of the existence of the suit and service of the summonses is not proof that the order, which bore the date of hearing of the application, was properly served on the Defendants or at all.
19. The only Affidavit of Service on record is dated 16th May, 2024 and was sworn by Michael Chemwok. He deponed therein that on 12th May, 2024 he served the Defendants with a Mention Notice for 25th May, 2023 and the order dated 20th April, 2024. It is therefore possible that the Defendants were not served with the Application and/or order indicating the hearing date prior to issuance of the impugned order. I am persuaded that the reason of non-service offered by the Defendants is plausible and amounts to ‘sufficient reason’ within the meaning of the rules cited above.
20. The Defendants also based their application on Section 63(e) of the *Civil Procedure Act* which provides that:-
- “In order to prevent the ends of justice from being defeated, the court may, if it is so prescribed...make such other interlocutory orders as may appear to the court to be just and convenient.”
21. On the strength of that provision, this court will allow the prayer for status quo pending hearing and determination of the suit. I am however guided by the decision of Onguto J. as he then was in *Tbugi*



River Estate Limited & another v National Bank of Kenya Limited & 3 others (2015) eKLR where he held thus:

“I have indicated that the court was entitled to make an order for status quo. However, such orders are not to be in a vacuum. The court should have ensured that there was a clear description of the status quo being maintained.”

22. The Parties herein are in agreement that the Defendants were assigned 2-Acre portions each by the Plaintiff on which they have settled. It was deponed in the Defendants’ Supporting Affidavit that they only live on, utilize and cultivate the said 2-Acre portions of the suit property. For that reason, I do not doubt that the Plaintiff is right in that she retained the remaining 8.5-Acre portion for herself. From my understanding, this was the case since the commencement of this suit.
23. Accordingly, this court hereby makes the following orders:-
- a. An order for status quo be and is hereby issued to the effect that the status quo prevailing at the commencement of this suit shall be maintained on the suit property pending hearing and determination of the suit. For the avoidance of doubt, the order of status quo shall entail the following:
 - i. The Defendants will continue to remain on, cultivate and otherwise utilize the 2-Acre portions assigned to them by the Plaintiff herein prior to the institution of this suit.
 - ii. The Plaintiff shall retain exclusive possession and use of the remaining 8.5-Acre portion which she is at liberty to cultivate.
 - iii. The Defendants herein are restrained from trespassing, encroaching onto or otherwise interfering with the Plaintiff’s use and enjoyment of the 8.5-Acre portion during the pendency of this suit.
 - iv. The costs of this application shall be in the cause.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 24TH DAY OF SEPTEMBER 2024

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J.M ONYANGO

JUDGE

In the presence of;

1. Mr. Chemwok for the Plaintiff
2. No appearance for the Defendant

Court Assistant: Brian

