



In re Estate of Pila Musa Ang'aha alias Pila Ang'aha (Succession Cause 97 of 2021) [2024] KEHC 5366 (KLR) (30 April 2024) (Ruling)

Neutral citation: [2024] KEHC 5366 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VIHIGA
SUCCESSION CAUSE 97 OF 2021
JN KAMAU, J
APRIL 30, 2024**

IN THE MATTER OF THE ESTATE OF PILA MUSA ANG'AHA ALIAS PILA ANG'AHA

BETWEEN

ANNE WAKA OYALO APPLICANT

AND

DAMARIS ONEA OKINDA RESPONDENT

RULING

1. In her Notice of Motion dated 29th September 2023 and filed on 2nd October 2023, the Applicant herein sought orders that an order of injunction restraining the Respondent either by herself or through her servants/agents or any other person whatsoever from tilling, ploughing, planting, working or in any other way interfering with LR No W/Bunyore/Emusire/1053 (hereinafter referred to as “the subject property”) be granted pending the hearing and determination of this cause. She also sought an order for the Respondent to be committed to civil jail for a period of six (6) months or fined Kshs 200,000/= or both for contempt of the court.
2. She swore an Affidavit on 29th September 2023 in support of the said application. She asserted that she and the Respondent were each assigned their portions after the subject property was surveyed on 3rd November 2022 and a Report dated 8th November 2022 was filed in court. She averred that on 4th November 2022, the Respondent moved the court and obtained orders to the effect that the status quo be maintained, the status being that the subject property had been surveyed and each party given her portion. She stated that, however, the Respondent violated the said order by ploughing, removing beacons, demolishing pit latrines and removing the doors and damaging the business premises that existed on the said subject property for years (sic).
3. She further averred that the Respondent had clashed with villagers whom she had denied accessibility to the borehole that was dug by her late husband with the help of the Rotary Club.



4. She asserted that the Respondent had been causing unnecessary delay in disposing of this matter as she was benefitting by violating the court orders, including the one that she herself had obtained.
5. She added that the Respondent had confirmed that indeed she served the order under review on 14th November 2022 way after the land had been demarcated by the Surveyor on the 3rd November 2022 thereby establishing the status quo as at 4th November 2022.
6. In opposition to the said application, the Respondent swore a Replying Affidavit on 10th November 2023. The same was filed on 14th November 2023. She termed the present application as frivolous and an abuse of the court process because it had not been brought in good faith.
7. She pointed out that she was the one who was living on the subject property since she got married to her late husband, Jackson Omale Angaha, in 1994. She asserted that on 1st November 2022, she moved the court vide an application dated 28th October 2022 for revocation of the grant relating to the said subject property. She stated that the application was placed before the Judge on 4th November 2022 and that the court ordered that the status quo be maintained as at 4th November 2022.
8. It was her contention that the demarcation that was to take place on 3rd November 2022 was not successful as when the survey was carried out, it was found that the total acreage of the land parcel was 1.52 acres and not 1.9 (sic) as per the Certificate of Confirmation of Grant. She asserted that the Surveyor then advised on how the partitioning could be done but the same did not proceed as he was strictly to carry out the survey so as to partition it as per Certificate of Confirmation of Grant.
9. She pointed out that the County Land Registrar's advisory could not override the court order and therefore if the Applicant was relying on the said advisory, then that was null and void. She added that such discrepancies could only be rectified by a court order after considering application for rectification or amendment.
10. She further averred that as at 4th November 2022, she was the one living and ploughing the subject property with her family and had developed the whole of it save for the dilapidated shop which was put up by her late father-in-law. She stated that the Applicant's sons destroyed her crops by digging a trench after the survey had been done. She asserted that after they uprooted her napier grass, she reported the matter at Mwichio Police Station OB/NO/03/18/08/2023. She added that on 27th September 2023, the Applicant and the sons slashed all her maize, a matter which she again reported at Mwichio Police Station, OB/NO/27/9/2023.
11. It was her contention that the Applicant had settled and developed the land parcel No West/Bunyore/Emusire/1073 together with her family, which was the land allocated to her late husband and that she had never occupied or cultivated the subject property. She was categorical that she had never threatened the Applicant's family but instead it was the Applicant who constantly threatened to destroy her house. She further pointed out that it was the Applicant and her family who had caused grievous harm to her family and that they were charged in Vihiga Criminal Case No 1164 and No 274 wherein they were found guilty and convicted for one (1) year on probation (sic).
12. She denied having caused any destruction to the latrines or building and averred that the doors of the said latrines were removed by one Tom Daniel who was working under the instruction of the Applicant. She further denied stopping the community from fetching the bore hole water and averred that they still used the said water. She said that she had always been the caretaker of the said borehole. She stated that it was the Applicant who had been delaying the substantive matter herein from being heard and determined by filing several unnecessary applications.



13. On 27th November 2023, the Applicant swore a Further Affidavit in response to the Respondent's Replying Affidavit. The same was filed on 30th November 2023.
14. She reiterated her averments on her affidavit in support of the application and stated that the fact that she was entitled to a portion of the subject property was not in dispute as that was within the knowledge of the Respondent and her husband. She pointed out that as per the Respondent's averments, she was aware of the court's order but proceeded to violate the same. She stated that if the Respondent was dissatisfied with the Land Registrar's mode of demarcation, she ought to have moved the court to challenge the same instead of blatantly refusing to accept it and violating it with contempt.
15. She denied the Respondent's averment that the dilapidated shop was put up by her father-in-law and claimed that the same was done by her husband in 1978 on the portion of the subject property that belonged to him. She further stated that she was the one who reported the removal of the beacons by the Respondent on 7th July 2022, 5th August 2023 and 11th October 2023 via OB No 05/07/07/2023, OB No 04/05/08/2023 and OB No 03/11/20/2023 respectively when the remainder of the beacons were removed.
16. She asserted that the reports made at the Police Station by the Respondent's son, one Moses Pila, was just to cover their own mischief. She denied having uprooted any crops and averred that it was the Land Registrar and his team who did so as they were carrying out demarcation of the subject property in the presence of both parties.
17. She further contended that she did not know the said Tom Daniel who the Respondent said was the one who removed the latrine doors. She pointed out that the photographs the Respondent relied upon were old photographs which did not depict the actual picture on the ground as at the time in question.
18. She was categorical that LR No West/Bunyore/Emusire/1073 was not allocated to her late husband as alleged by the Applicant but that he bought the same from the family of one Justo Ofwale in early 1960s and became the first registered proprietor.
19. The Applicant's Written Submissions were dated 16th January 2024 and filed on 29th January 2024 while those of the Respondent were dated and filed on 20th February 2024. This Ruling is based on the said Written Submissions which both parties relied upon in their entirety.

Legal Analysis

20. The Applicant submitted that she had demonstrated that she stood to suffer irreparable loss if the Respondent was not restrained from her actions on the subject property. She asserted that the Respondent had been acting in impunity by perpetually violating court orders. It was her contention that mere knowledge of existence of a court order was enough to warrant meting out punishment for contempt. She urged the court to grant the orders sought.
21. On her part, the Respondent reiterated her averments made in her affidavit and submitted that she had been cultivating and planting maize and beans for family subsistence and that issuing an injunction to stop the same would be an injustice to the family. She pointed out that the Applicant had not demonstrated that she would suffer any irreparable loss. She added that since the Applicant had developed West/Bunyore/Emusire/1073 where she also cultivated, then it was proper that she waits until the case was heard and determined.
22. She asserted that she was not in contempt of any court order and cited the definition of the word "status quo" in The Black's Law Dictionary Britter Wont's 9th Edition which was, "the situation as it exists" and placed reliance on the cases of *Republic v National Environment Tribunal Ex-parte Palm Homes*



Limited & Another [2013]eKLR and Kenya Airline Pilots Association (KALPA) v Co-operative Bank of Kenya Limited & Another [2020]eKLR where the common thread was that an order maintaining status quo was meant to preserve the existing state of affairs.

23. She further asserted that as per the letter dated 8th November 2022 by Christopher K. Tuwei, the County Lands Surveyor, the Surveyor did not put any beacons on the subject property due to the discrepancies in its actual size on the ground vis-à-vis its size as provided in the Certificate of Confirmation of Grant. The same had not therefore been subdivided as at 4th November 2022. She urged the court to dismiss the Applicant's application for lack of merit.
24. This court had due regard to the definition of the word "status quo" in The Black's Law Dictionary Britter Wont's 9th Edition which was, "the situation as it exists" as submitted by the Respondent and also had regard to the case of Kenya Airline Pilots Association (KALPA) v Co-operative Bank of Kenya Limited & Another (*Supra*) where it was held that an order maintaining status quo was meant to preserve the existing state of affairs.
25. Notably, on 4th November 2022, Musyoka J gave the following orders:-
 1. The Summons for Revocation of Grant dated 28th October 2019 to be served.
 2. It shall be mentioned for directions on a date the Deputy Registrar shall give.
 3. Let status quo as at 4/11/22 be maintained (emphasis court).
26. Although the Applicant's prayer for order for contempt of court and injunction were intertwined, this court dealt with the issue of contempt of court before delving into the question as to whether the Applicant had demonstrated that she had satisfied the criteria that was set out in the case of Giella v Cassman Brown & Company (1973) EA 358 which set out the parameters of the granting of an interlocutory injunction or not.
27. There was no doubt that contempt of court proceedings were a serious undertaking because a court exercising this jurisdiction was minded to ensure the orderly functioning of society and the rule of law. On conviction, the alleged contemnor stood to lose his or her liberty. It could not, therefore, be taken lightly.
28. The contempt of court proceedings were in the nature of criminal proceedings. It was for that reason that proof of a case against a contemnor was higher than that of balance of probability as was held in the case of Mutitika v Babarini Farm Limited [1985] KLR 229, 234.
29. The power to punish for contempt which was discretionary one therefore ought to be exercised sparingly. The applicant was required to demonstrate that the contemnor had personal knowledge of an order that was served on him or her and that he or she had wilfully disobeyed the order. The applicant was therefore required to prove wilful and deliberate disobedience of the court order by the contemnor as was held in the case of Econet Wireless Kenya Ltd v Minister for Information & Communication of Kenya & Another [2005] eKLR.
30. A perusal of the court file showed that although the order Musyoka J issued on 4th November 2022 was pursuant to the Respondent's Summons for Revocation of Grant dated 28th October 2019 (sic) (cancelled and indicated by biro as 2022) and filed on 1st November 2022, there was no evidence that she was notified of the said orders and/or her advocates were present when Musyoka J issued his said order.



31. Notably, on 3rd November 2022, the Surveyor went to the subject property to partition the same at 1.0 acre and 0.9 acres for the Applicant and the Respondent herein. This was as per the Certificate of Confirmation of Grant dated 6th September 2019.
32. In his Report dated 8th November 2022, he observed that the total acreage of the subject property was 1.52 acres and not 1.9 acres as had been indicated in the said Certificate of Confirmation of Grant dated 6th September 2019. He therefore proposed sub-division of the subject property at 0.65 acres and 0.86 acres in respect of the Applicant and the Respondent respectively.
33. In Paragraph 10 of her Affidavit in support the said Summons for Revocation of Grant dated 28th September 2022 and filed on 1st November 2022, the Respondent indicated that she had remained in the subject property while the other beneficiaries lived on other parcels of land that the deceased allocated to them. As the status quo order was issued ex parte and before the Applicant herein had filed a response in opposition thereto, it was not clear if the Applicant also lived on the said subject property.
34. Be that as it may, in her Replying Affidavit to the Summons for Revocation of Grant dated 28th September 2022 that she swore on 18th December 2022 and filed on 26th January 2023, the Applicant was silent on whether she occupied a portion of the said parcel of land or not. Her argument was mainly that the Surveyor had demarcated the subject property as per the Certificate of Confirmation of Grant dated September 2019 but that the Respondent had started planting maize crops in the entire subject property. In the absence of oral evidence, it was difficult for this court to state with certainty who was actually in occupation of the entire subject property as at the time Musyoka J issued his order on 4th November 2022.
35. In the mind of this court, there was ambiguity of what the status as at 4th November 2022 meant to wit, whether it meant that the Respondent was currently in occupation of the subject property or whether the Applicant was the one who had been tilling the land as at that date or whether the Applicant and the Respondent were entitled to their respective portions as had been indicated in the Certificate of Confirmation of Grant dated 6th September 2022 or the Surveyor's Report dated 8th November 2022 .
36. Taking into account the material that had been placed before this court and the uncertainty of what really the status of this matter was, it was not satisfied that the Applicant had proved her case against the Respondent to the required standard so as to warrant her being committed to civil jail.
37. Having said so, the status as at 4th November 2022 was that the demarcation and survey exercise that was to be supervised by the Officer Commanding Station (OCS) Luanda Police Station as per the orders of Musyoka J of 20th January 2021 had been carried out the previous day, 3rd November 2022.
38. It was clear from the affidavit evidence of both parties that there was great animosity and hostility with several reports made at Mwichio Police Base. It was therefore necessary that order be maintained pending the hearing and determination of the Respondent's Summons for Revocation of Grant dated 28th September 2019.
39. Indeed, it was the duty of this court to ensure that disputes were resolved and not to cause further conflicts within family relations. This could only be achieved by maintaining the status quo on both sides to ensure a smooth flow of handling this succession cause and for expeditious determination of the case as justice delayed is justice denied.
40. There was no evidence that the distribution of the deceased's subject property as the Certificate of Costs dated 6th September 2022 had been set aside and/or vacated. Indeed, the Respondent's Summons for Revocation of Grant dated 29th September 2022 had not yet been heard and determined.



41. The situation as it existed on 4th November 2022 meant that the Applicant was entitled to her portion as per the said Certificate of Confirmation of Grant dated 6th September 2019 and the Respondent could not therefore purport to till, plough, plant, work or in any other way interfere with the portion that had been allocated to the Applicant herein.
42. There was therefore merit in the Applicant being granted Prayer No (3) of her present Notice of Motion application on a balance of convenience which was one of the criteria set out in the case of *Giella v Cassman Brown & Company (Supra)* that a court could adopt when considering whether to grant an interlocutory injunction or not. Indeed, an applicant had to demonstrate the following:-
 - a. That he or she had established a prima facie with a probability of success;
 - b. That he or she would suffer irreparable loss that could not be compensated by way of damages;
 - c. That if the court was in doubt, then it could grant the order for interlocutory injunction on a balance of convenience.
43. The concern for this court was, however, what portion both the Applicant and the Respondent were entitled to pending the hearing and determination of the Respondent's Summons for Revocation of Grant dated 29th September 2022 in view of the reduced acreage on the ground.
44. This court determined that it was only fair in the circumstances of the case that both the Applicant and the Respondent be entitled to the portions as per the Report dated 8th November 2022 pending the hearing and determination of the Respondent's Summons for Revocation of Grant dated 29th September 2022 as they were both the deceased's daughters- in- law with none being superior to the other.
45. However, this court could not pronounce itself on who was to occupy which portion in the absence of more evidence. In any event, the Applicant had not sought to occupy the said parcel of land. Her application related to the tilling, ploughing, planting, working on the subject property.

Disposition

46. For the foregoing reasons, the upshot of this court's decision was that the Applicants' Notice of Motion application dated 29th September 2023 and filed on 2nd October 2023 was merited and the same be and is hereby allowed in terms of Prayer No (3) therein but limited to the portion of 0.65 acres as per the Report of the Surveyor dated 8th November 2022.
47. As this was a family matter and not to further escalate the dispute between the families, this court found it prudent to deviate from the general principal that costs follow the events. Consequently, each party will bear its own costs.
48. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 30TH DAY OF APRIL 2024.

J. KAMAU

JUDGE

