



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAKURU**

**ELC 139 OF 2019**

HARRISON WAWERU NGANGA.....1<sup>ST</sup> PLAINTIFF

MATIGARI NDUNYINJERU CO. LTD.....2<sup>ND</sup> PLAINTIFF

**VERSUS**

ANTHONY KAMAU NDOGE.....DEFENDANT

**RULING**

**Application**

1. The applicant moved the court through Chamber Summons dated 3/8/2021 brought under Section 10 of the Judicature Act, Part 1 Rule 2(2) of the High Court Practice and Procedure Rules, Order 25 (6), 40, 51 Rule 16, Order 60, 63 of the Civil Procedure Rules, Section 1A, 1B and 3A of the Civil Procedure Act, Article 159 (2) (d) of the Constitution and Section 63(e) & 80 of the Civil Procedure Act, Order 45 of the Civil Procedure Rules 2010 seeking the following orders:

1. ...spent

2. That the Honourable court be pleased to vary the orders of *status quo* in force and issue an order of temporary injunction against the plaintiffs/respondents and all their agents from entering, selling, subdividing, occupying, controlling, using and or otherwise transacting with the title to the suit property herein known as Hilly and Rocky Area Adjacent to Ndunyu Njeru pending the hearing and determination of the instant application.

3. That an order of temporary injunction do issue restraining the respondents, their agents, servants, employees and/or representatives or anyone working under them or for them from evicting, interfering, threatening, trespassing, entering into or in any way dealing or otherwise interfering with the quiet enjoyment and occupation of the subject suit land owned herein (incision of 50 acres) Hilly and Rocky Area Adjacent to Ndunyu Njeru by the defendant/applicant and his tenants pending the hearing of the suit, herein filed.

4. That pending the hearing and determination of this application this Honourable court does order the Lands Registrar, Naivasha to impose a caution to preserve the subject matter of this suit herein from transfers and ongoing disposals.

5. That this Honourable Court compels the plaintiffs/respondents to deposit the subject title to court pending the hearing of this application and suit.

**6. That the costs of this application be provided.**

2. The application is supported by the affidavit sworn on **3/8/2021** by **Anthony Kamau Ndoge** where he deposed that he sought and obtained orders of *status quo* in the present suit and which were granted with a view of expediting the subject property which *status quo* is now under breach by the plaintiffs/respondents through sales and subdivisions to third parties; that the defendant/applicant has been subjected to constant summons and harassment by the police at the instance of the respondents with a view to altering the substratum during the pendency of this case despite the existence of *status quo* orders of injunction.

3. He further deposed that the court gave a hearing date of **19/3/2020** for the suit but the hearing aborted due to the prevailing pandemic and subsequent mentions for compliance and amendments; that the plaintiffs/respondents misreported and procured police services and caused to be summoned both the defendant/applicant and his tenants to Gilgil police station with a view to arrest and forcefully evict them despite the matter still pending in court; that the defendant/applicant has been irregularly sued despite the validity of an existing contract between plaintiff/respondent and the defendant/applicant; that there is an apparent admission on the face of the record that the defendant/applicant owns the incision of **50** acres cited in the plaint and by a letter dated **26/7/2021** as well as cheques worth **2.3 million** as claimed value of purchase.

4. The defendant/applicant also deposed that he is the valid and proper owner of the said **50** acres, an incision on the contested suit property that he lawfully purchased with the proposed interested parties as witnesses; that he has extensively developed and occupied the suit land since purchase and that the orders sought will safeguard the subject matter that is to be dissipated by the plaintiffs/respondents to destroy the substratum of the suit; Further, that the plaintiffs/respondents conduct has adversely affected the defendant/applicant as the plaintiffs/respondents through connivance have sustained the defiance of the orders of the *status quo* and proceeded to extract and register titles irregularly during the pendency of this matter and he is at an advanced stage of disposal of the suit property.

5. The defendant/applicant finally stated that the plaintiff/respondents have planted illegal beacons and as such he continues to suffer irreparable damage and loss despite the orders of status quo in place as the same is being violated by the plaintiff/respondents hence the need to protect the subject property.

**Response**

6. The plaintiffs/respondents filed a replying affidavit dated **3/9/2021** sworn by **Harrison Waweru Ng'ang'a** where he deposed that the defendant/applicant did not seek orders for *status quo* but on the contrary the said orders were issued by consent in his application for injunction against the defendant/applicant herein; that no evidence has been produced to prove that he intends to sell the suit property; that he has severally reported the defendant/applicant to the police when he attempted to bring third parties to the suit land.

7. He further deposed that the suit property in dispute does not belong to the defendant/applicant but the defendant/applicant only offered to purchase a portion of the said property but breached the said contract when he failed to pay the entire purchase price; that the defendant/applicant has continued to encourage third parties to take possession and develop the property when there are valid court orders hence the police intervention to ensure compliance with the current orders in place; Further, that there is no valid agreement between the defendant/applicant and the plaintiff/respondent at the moment and that the defendant/applicant does not own the incision of **50** acres as claimed.

8. The plaintiff/respondent also deposed that they offered to refund the money paid to the defendant/applicant in order to bring the matter to an end; that there are no proposed interested parties in the suit and that the beacons on the ground were placed long before the *status quo* orders were made. He concluded by stating that the defendant/applicant has not been on the suit land and he instead wants a variation of the *status quo* order to allow him get access to the property.

**Submissions**

9. The plaintiffs/respondents filed their written submissions on **5/11/2021**. I have perused through the court record and I have not found any submissions filed on behalf of the applicant.

### **Determination**

10. The issue that arises for determination is whether the defendant/applicant's application dated **3/8/2021** is merited.

11. In the Court of Appeal case of **Mugah –v- Kunga [1988] KLR 748**, the court held that in land matters *status quo* orders should always be issued for purposes of preserving the subject matter. **Order 40 Rule 3(1) of the Civil Procedure Rules** stipulates as follows:-

**In cases of disobedience, or of breach of any such terms, the Court granting an injunction may order the property of the person guilty of such disobedience or breach to be attached, and may also order such person to be detained in prison for a term not exceeding six months unless in the meantime the Court directs his release.**

12. It is not in doubt that the court on **15/01/2020** issued a *status quo* order in respect to the suit property. A *status quo* order simply maintains a state of affairs between the parties. On **2/03/2020** the parties went further and also consented that the *status quo* with regard to the suit property be maintained. The state of affairs of the suit property was not addressed and this court will not endeavor to try and demystify the state of affairs as of **15/01/2020**.

13. The instant application seeks to vary the *status quo* order and substitute it with that of a temporary injunction. The defendant/applicant had earlier filed an application dated **19/12/2019** seeking temporary injunction against the plaintiffs/respondents. The said application was scheduled for hearing on **2/03/2020** when parties decided to have the *status quo* maintained. It is my opinion that while in agreement with the plaintiffs/respondents the court never issued any interim orders and thus the said application was dispensed with at that point. It is therefore my view that the defendant/applicant cannot again move the court seeking temporary injunction orders against the plaintiffs/respondents yet he had the opportunity to do so on **2/03/2020** when the said application came up for hearing as this would clearly amount to an abuse of court process.

14. The defendant/applicant stated that the plaintiff/respondent in defiance of the said order, has gone ahead and registered titles irregularly. However, it is my view that since the defendant/applicant has not annexed any evidence to prove the same the said allegation does not hold.

15. The defendant/applicant also avers that the plaintiff/respondent has planted illegal beacons in the suit property to which he annexed photographs. The said photographs unfortunately do not bear any evidence of when they may have been taken and since the respondent avers that the beacons were placed before the status quo orders issued, it would be difficult for this court to ascertain the applicant's allegation at the moment.

16. In light of the above, it is therefore my view that the defendant/applicant has failed to prove his case against the plaintiff/respondent on a balance of probabilities.

17. The question in the instant case would be whether there is sufficient reason to interfere with the order of the court made on **15/01/2020**. It is my opinion that the answer is in the negative, this is because in the event a party is aggrieved by an order of the court, there are set down procedures to show such displeasure and move to court to challenge or request for a review of the order. In the instant case, it is clear from the court records that the defendant/applicant has numerously addressed the court on disobedience by the plaintiff/respondent in regard to the *status quo* order; however, the defendant/applicant never lodged any contempt proceedings against the plaintiff/respondent nor sought for review of the orders in place.

18. The defendant/applicant avers that he is the owner of **50** acres incision of the suit property while the plaintiff/respondent on the other hand contends that the said property does not belong to the him by virtue of breach of contract since the applicant failed to pay the entire purchase price as per the sale agreement dated **20/6/2013**. It is this court's opinion that the ownership of land parcel is what is in issue and the court is to determine the lawful owner of the suit property in the main suit. In the meantime any interim orders of court issued for the preservation of the status quo must be obeyed and any claim of infraction of the orders must be backed by evidence.

19. The upshot of the foregoing is that it is this court's opinion that the application dated **5/11/2020** lacks merit and the same is hereby dismissed with costs to the plaintiff/respondent.

20. However, all the parties are hereby warned that as long as the *status quo* orders are in place, the court will not condone anything done by any of them that is in breach of that order and it will act if appropriately moved with sufficient evidence supplied.

**DATED, SIGNED AND DELIVERED AT NAKURU VIA ELECTRONIC MAIL ON THIS 15<sup>TH</sup> DAY OF DECEMBER, 2021**

**MWANGI NJOROGE**

**JUDGE, ELC, NAKURU.**



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