



REPUBLIC OF KENYA



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Onkangi & another v Mikubo & another (Environment and Land Case Civil Suit E003 of 2023) [2023] KEELC 22596 (KLR) (28 March 2023) (Ruling)

Neutral citation: [2023] KEELC 22596 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NYAMIRA

ENVIRONMENT AND LAND CASE CIVIL SUIT E003 OF 2023

JM KAMAU, J

MARCH 28, 2023

BETWEEN

DANIEL PAUL ONKANGI 1ST PLAINTIFF

WILFRED K BABU 2ND PLAINTIFF

AND

JAMES MANGAA MIKUBO 1ST DEFENDANT

ORINA MAYENGA 2ND DEFENDANT

RULING

1 The Application before court is dated March 24, 2023. It was brought under a Certificate of Urgency on the ground that the Defendants/Respondents have destroyed the common boundary between the Plaintiffs' land, Nyansiongo Settlement Scheme 318 & 319 and entered onto the Plaintiffs' land and commenced cutting trees regardless of the environmental destruction and concern. The Application seeks for the following substantive prayers: -

1. That the Application be certified urgent and be dispensed with.
2. That the Honourable court do grant an injunction order restraining the Defendants, their heirs, servants, agents or anyone claiming through their name from cutting trees, trespassing, encroaching and destroying the common boundary pending the hearing and determination of this Application.
3. That the Honourable court do grant an Injunction order restraining the Defendants, their heirs, servants, agents or anyone claiming through their name from cutting trees, trespassing, encroaching and destroying the common boundary pending the hearing and determination of this suit.



4. That the Honourable Court do order the Plaintiffs and the Defendants to present and submit their titles, Nyansiongo Settlement Scheme 318 & 319 and Isoe Settlement Scheme Parcel No 809 & 116 and the Survey Map to the Nyamira Land Registrar to conduct survey on the ground, write a report and be filed in court.
2. The grounds upon which it is supported are that: -
 - a. The 1st Applicant is the registered owner of Nyansiongo Settlement Scheme Parcel No 319 and the 2nd Defendant is the Legal Administrator of the Estate of Mzee, Babu Siko (Deceased).
 - b. The Respondents have taken advantage of the demise of Mzee, Babu Siko to destroy, trespass, encroach the deceased's Estate and have made it difficult for the Estate to be distributed among his beneficiaries.
 - c. The Respondents are not purchasers or lessees instead intruders of the Estate of the deceased and the 1st Applicant.
 - d. The Respondents have encroached and trespassed and commenced to cut the trees regardless of the environmental destruction and the care of the Applicants' properties and unless restrained, they are likely to continue destroying causing irreparable damages.
 3. Attached to and in support of the Motion is the Affidavit of Daniel Paul Onkangi, the 1st Plaintiff in the suit which among other things depones that:-
 - 2) He is the registered owner of land No Nyansiongo Settlement Scheme Parcel No 319
 - 3) His Co-Plaintiff/Applicant is the son of Mzee, Babu Siko (Deceased) who passed on while domiciled at Nyansiongo location herein the registered owner of the parcel, Nyansiongo Settlement Scheme No 318 with Letters of Administration of the Estate.
 - 4) He said that the two parcels of and Nyansiongo Settlement Scheme Parcel No 318 & 319 shares the common boundary with parcels, Isoe Settlement Scheme Parcels No 116 & 809 as held by the Defendants.
 - 5) He averred that a common boundary is also shared between Nyansiongo Settlement Scheme And Isoe Settlement Scheme.
 - 6) The said common boundary is known and always had boundary beacons which in several occasions have been removed by the Defendants upon replacement.
 - 7) The said common boundary between the Applicants and the Respondents was previously separated by a marked road which has since disappeared.
 - 8) Following the death of Mzee, Babu Siko, the Respondents have taken advantage and have encroached and trespassed onto my parcel of land Nyansiongo Settlement Scheme Parcel No 319 and that of the deceased No 318
 - 9) The Respondents have destroyed the boundary, beacons and fence and entered into the two parcels cutting trees and destroying the environment.
 - 10) The Land Registrar, Nyamira had surveyed the land and marked beacons on the common boundary which have now been destroyed by the Respondents together with the fence on the common boundary.



4. In his written statement accompanying the Plaint, the 1st Plaintiff states that:-
- " My boundary beacons are known for previously I engaged the Nyamira Land Registrar who surveyed and established the beacons by a court order in Kisii High Court ELC No 754 of 2016."
5. The Prayers sought in the Plaint are as follows: -
- i. That the Honourable court do grant a permanent injunction order restraining the Defendants, their agents, servants or anyone acting on their behalf from encroaching, trespassing, destroying or interfering with the common boundary, beacons or fence or cutting trees on, Nyansiongo Settlement Scheme Parcels No 318 & 319.
 - ii. That the Honourable court do order the Land Registrar Nyamira, the parties of Nyansiongo Settlement Scheme Parcel No 318 & 319 and Isoge Settlement Scheme Parcel No 809 & 116 to visit the ground and conduct survey to establish the boundaries, re-beacon and write a report and file it in court.
 - iii. That the Plaintiffs be allowed to fence along the common boundary.
 - iv. That the Officer Commanding Matutu Police Station (OCS) be ordered to enforce compliance of the Honourable Court's orders.
 - v. Costs and interest of the suit.
6. From the Plaint and the 1st Plaintiff's written statement accompanying the Plaint, the court notes that there was a suit in Kisii ELC Court Civil Suit No ELC 754 of 2016. In spite of the so many documents the Plaintiffs have filed in their bundle of documents, they have not found it fit to file in court copies of pleadings to show the outcome of Kisii ELC Case No 754 of 2016 and/or to what extent the same had proceeded. This court risks giving orders that may have been granted or denied in Kisii ELC Case No 754 of 2016, a Court of corresponding jurisdiction.
7. I also wish to observe that if the court in Kisii had granted orders in favour of the Plaintiffs against the 1st Defendant in Kisii ELC Case No 754 of 2016, as the Plaintiffs have pleaded in paragraph 12 of the Plaint, then why file this suit and not execute the orders therein?
8. Should I proceed and grant the orders sought under the Application dated March 24, 2023? Supposing I do so and then it turns out that the issues raised herein are the same or similar to those in the ELC Court Kisii, shall I not be encroaching into and breaching the doctrine of *Res judicata*? I wish to refrain from doing so.
9. It is important and very crucial for parties to disclose all material facts in a case when they approach the seat of justice. I am surprised that the Plaintiffs on one hand plead in the Plaint that there was a suit between them and the 1st Defendant but in their Verifying Affidavit depone that:
- " there is no other suit pending in court between the Plaintiffs and the Defendants over the same matter."
10. Parties must be as candid as possible to enable the court to arrive at a just and judicious decision. The relevant facts left out in the pleadings in this case are as important as if not more important than what is disclosed.



11. The best I can do in the circumstances I find myself in, which I hereby do, is to order that the Applicants serve the Application dated March 24, 2023 upon the Defendants within the next 7 Days from the date hereof. Upon being served, the Defendants/Respondents are ordered to file and serve their Responses within 7 Days thereafter and in case the Respondents or any of them chooses to file a Replying Affidavit, the Applicant may file a Further Affidavit within 7 Days from the date of service so that they can bring out the relevant facts left out in the pleadings. But in case no Replying Affidavit is filed, then I order that the Plaintiffs file a further list/bundle of documents incorporating the pleadings and proceedings in Kisii ELC No 754 of 2016. This Application will then be disposed by way of oral submissions on April 18, 2023.
12. These are the Directions of this court.

RULING DATED, SIGNED AND DELIVERED AT NYAMIRA THIS 28TH DAY OF MARCH 2023.

MUGO KAMAU

JUDGE

In the Presence of:

Court Assistant: Sibota

Plaintiffs: N/A

Defendants: N/A

