



**Onyango v Lessonet & another (Environment & Land Case
E02 of 2020) [2023] KEELC 16280 (KLR) (16 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16280 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE E02 OF 2020
LA OMOLLO, J
MARCH 16, 2023**

BETWEEN

JOHN ORIRI ONYANGO PLAINTIFF

AND

ALBERT KIPKOSGEI LESSONET 1ST DEFENDANT

BEKAPI ENTERPRISES LIMITED 2ND DEFENDANT

RULING

1. This ruling is in respect of the Plaintiff's Preliminary Objection dated November 22, 2022. It is on the following ground:

That the Replying affidavit as filed by the 1st Defendant offends the provisions of Order 2 Rule 13 on the ground that it was filed without leave of the court.

Factual Background

2. This suit was commenced by way of an Originating Summons filed on October 23, 2020 and amended on May 27, 2022. ummons filed on May 27, 2022. The Plaintiff seeks for the following orders:
 - a. A declaration that the title of the 2nd Defendant, Bekapi Enterprises Limited, to the leasehold interest in Land Parcel No. Nakuru/Municipality Block 12/236 containing by measurement 0.1350 Hectares has been extinguished by the Plaintiff's adverse possession thereof for a period of more than 12 years in terms of Sections 17 and 38 of the *Limitation of Actions Act*.
 - b. A declaration that the Plaintiff has acquired the leasehold title and/or interest in Land Parcel No. Nakuru/Municipality Block 12/236 containing by measurement 0.1350 Hectares by his adverse possession thereof for a period of more than 12 years.



- c. An order do issue requiring and directing Nakuru County Land Registrar to register the Plaintiff, John Oriri Onyango, as the proprietor of the leasehold title Nakuru/Municipality Block 12/236 containing by of Land Parcel No. measurement 0,1350 Hectares in place of the 2nd Defendant, Bekapi Enterprises Limited, and/or in place of any other person succeeding Bekapi Enterprises Limited.
 - d. An order of permanent injunction be and is hereby issued restraining both the 1st Defendant, and 2nd Defendant, whether by themselves or by their agents, servants, employees and/or any person acting under their authority/instructions from entering onto, remaining on, trespassing upon, auctioning, selling, disposing and/or from howsoever interfering with the Plaintiff's possession, ownership and/or occupation of all that Land Parcel No. Nakuru/Municipality Block 12/236 containing by measurement 0.1350 Hectares.
 - e. The costs of this summons be in the cause.
3. The matter came up for hearing on November 22, 2022 when the Plaintiff's advocate raised an objection in respect of the 1st Defendant's Replying Affidavit for reason that it had been filed without leave of court.
 4. The Preliminary Objection was argued orally by both counsels for the Plaintiff and 1st Defendant.
 5. The same now forms the basis of the instant ruling.

Analysis and Determination.

6. The main issue for determination is:

Whether the Replying Affidavit dated November 10, 2022 ought to be expunged from the record.
7. Order 2 Rule 13 of the [Civil Procedure Rules](#) provides as follows:

“The pleadings in a suit shall be closed fourteen days after service of the reply or defence to counterclaim, or, if neither is served, fourteen days after service of the defence, notwithstanding that any order or request for particulars has been made but not complied with.”
8. The court record shows that the 1st Defendant was served with the Amended Originating Summons on May 28, 2022. This is evidenced in the affidavit of service dated May 30, 2022.
9. The court record also shows that the 1st Defendant's Counsel came on record on August 15, 2022 as shown in their Notice of Appointment of Advocates.
10. This court appreciates that pleadings had closed as at the time the 1st Defendant filed his Replying Affidavit i.e November 10, 2022. The 1st Defendant's advocate also admits to have filed the replying affidavit after close of pleadings.
11. The Plaintiff contends that the 1st Defendant had notice of these proceedings since the year 2020 and further, that in February, 2022 the 1st Defendant was granted leave to file his response within 14 days. He adds that on March 3, 2022 the 1st Defendant has not filed his response and also failed to appear in court.



12. In evaluating the objection raised I must and shall answer whether justice shall be best served by expunging the Replying Affidavit or by admitting it. It is also important for me to evaluate whether any prejudice shall be occasioned to the Plaintiff.
13. Article 159 (2) (d) of the Constitution of Kenya, 2010 reminds me that judicial authority shall be exercised without undue regard to procedural technicalities. Equally, Parties ought not to disregard rules of procedure as they are handmaids of justice.
14. I acknowledge that the parties herein have embarked on a quest for justice and it is this court's duty to ensure that justice is not only done, but that it is also seen to be done.
15. I am of the view that an order that deems the Replying Affidavit as being properly on record will not alter the character of these proceeding. It will serve the very important function of according a party an opportunity to be heard and resolving this matter on its merits.
16. In the Court of Appeal decision of Nicholas Kiptoo Arap Korir Salat Vs. Independent Electoral and Boundaries Commission & 6 Others [2013] eKLR the court held that:

“It is globally established that where procedural infraction causes no injustice by way of injurious prejudice to a person, such infraction should not have an invalidating effect. Justice must not be sacrificed on the altar of strict adherence to provisions of procedural law which at times create hardship and unfairness...

In modern times, the courts do not apply or enforce the words of statute or rules, but their objects, purposes and spirit or core values...reiterate what the court said in Githere Vs Kimungu [1976 - 1985] E.A. 101, that:

“.....the relation of rules of practice to the administration of justice is intended to be that of a handmaiden rather than a mistress and that the court should not be too far bound and tied by the rules, which are intended as general rules of practice, as to be compelled to do that which will cause injustice in a particular case.

...A look at recent judicial pronouncements from all the three levels of court structure leaves no doubt that the courts today abhor technicalities in the dispensation of justice.”

17. In the circumstances, It is only fair that the 1st Defendant's Replying Affidavit remains on record, in the interest of justice. Importantly, there is nothing to suggest that the Plaintiff would suffer any prejudice.

Disposition.

18. In the result, the Plaintiff's Preliminary Objection dated November 22, 2022 is hereby dismissed. Consequently, I issue orders as follows
 - a. The 1st Defendant's Replying Affidavit dated November 10, 2022 shall deemed as duly filed.
 - b. The Replying Affidavit dated November 10, 2022 filed shall be served upon the Plaintiff within 7 days of the date hereof.
 - c. The Plaintiff is at liberty, if need be, to file his response within 14 days upon service.
 - d. The cost of the preliminary objection shall abide the outcome of this suit.
19. It is so ordered.



DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 16TH DAY OF MARCH, 2023.

L. A. OMOLLO

JUDGE

