



REPUBLIC OF KENYA



KENYA LAW
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**Pere v Nella Limited & 2 others (Environment & Land Case
878 of 2014) [2023] KEELC 17212 (KLR) (27 April 2023) (Ruling)**

Neutral citation: [2023] KEELC 17212 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 878 OF 2014**

OA ANGOTE, J

APRIL 27, 2023

BETWEEN

FREDRICK MWATHI PERE PLAINTIFF

AND

NELLEA LIMITED 1ST DEFENDANT

NJOROGE MUGUKU 2ND DEFENDANT

LAND REGISTRAR, KAJIADO 3RD DEFENDANT

RULING

1. Before this Court is an application by the Plaintiff/ Applicant dated June 3, 2022, in which he has sought for the following orders:
 - a. That leave be granted to amend the name of the 2nd Defendant/Respondent in the pleadings for the same to read Robert Njoroge.
 - b. That the Honourable Court do find and hold that the 1st and 2nd Defendants/Respondents have committed contempt of Court for disobeying and defying the orders made on December 9, 2014 and do direct.

SUBPARA i.

That each of the directors of the 1st Respondent being Leah Wanjiku Muguku, J Rose Wambui Muguku, Daniel Muthanje Muguku and Francis Muhia Muguku and any other director of the 1st Respondents be fined such sums of money as this Honourable Court may direct and that the same be paid into Court forthwith.

SUBPARA ii.



That each of the Directors of the 1st Respondent aforesaid be committed to/ and or detained in prison for a term of six (6) months

SUBPARA iii.

That the 2nd Respondent, Robert Njoroge, be committed to and/or detained in prison for a term of six (6) months

SUBPARA iv.

That the 2nd Respondent, namely Robert Njoroge, be fined such sums of money as this Honourable Court may direct and the same be paid into court forthwith.

SUBPARA v.

That there be an Order for the attachment of property belonging to the 1st and 2nd Respondents, and each of them, to the extent of such value as this Honourable Court may direct.

- c. That the 1st and 2nd Respondents, and each of them, be denied audience before this Honourable Court until such time as they shall purged their contempt.
 - d. That the costs of this Application be borne by the 1st and 2nd Respondents.
2. The application is based on the grounds on the face of it and the Affidavit sworn in support by Margaret Wanjiru Pere, who has deposed that she has been authorized by the Plaintiff/Applicant to swear the Affidavit and that the Applicant is the registered owner of land known as Ngong/Ngong/12190.
 3. It was deposed that the Plaintiff/Applicant holds a beneficial interest in the property known as Ngong/Ngong/12189 registered in the name of Margaret Wanjiru Pere, the Applicant's mother (the suit property) and that this court on December 9, 2014 issued status quo orders preventing further excavation, construction or demolition of existing structures on the disputed portion.
 4. The Applicant deposed that on May 23 and 24, 2022, the 1st and 2nd Respondents willfully and deliberately disobeyed the above court order by entering upon the suit property by their agents/ employees and demolished the residential houses and shops on the disputed and undisputed portions; that no prior notice was issued to the Applicant or her tenants, occasioning substantial loss, damage and injustice to her and her tenants and that these illegal actions were undertaken in the context of out of court negotiations over the boundary dispute between the parties.
 5. It is the Applicant's averment that he reported the matter to Ongata Rongai Police Station; that an investigation established that the 2nd Respondent, whose correct name is Robert Njoroge, directed the illegal acts on behalf of the 1st Respondent, which is the registered proprietor of property Ngong/ Ngong/3545 abutting the suit property and that the 2nd Respondent is an agent, employee and or contractor of the 1st Respondent.
 6. The Applicant annexed to her Supporting Affidavit a copy of this court's order dated December 9, 2014; photographs showing the demolitions and the destroyed properties taken on May 6, 2022; the letter for arrangements for a site visit by the 3rd Respondent; the company search of the 1st Respondent company dated June 2, 2022 showing the directors of the company; photographs showing the 2nd Respondent directing and supervising the demolitions taken on May 23, 2022 and a letter from Horeria Kamau & Co Advocates evidencing that the Applicant reported the issue to Ongata Rongai Police Station as OB Number 87/24/05/2022.



7. The 1st Respondent opposed the application vide a Replying Affidavit sworn by Daniel Muthani Muguku, a director of the 1st Defendant, who deposed that the 1st Respondent has been compliant with the order of the court of 9th December 2014; that no structure on the disputed land has been demolished and that while there are some road construction works being undertaken by relevant public bodies on the road reserve on the suit properties, there was no interference with the structures on the claimed properties.
8. The 2nd Respondent also opposed and deponed that his full name is Isaac Njoroge Muguku and that he is not the person referred to as Robert Njoroge in the application. He annexed his Identity Card as proof of this.
9. According to the 2nd Respondent, he has defended this suit as named as a Defendant and is surprised that the Plaintiff has suddenly disclosed that he had sued him erroneously; that he is aware of the order of this court dated December 9, 2014 and that he has complied with the said order. It is the 2nd Respondent's case that no structure on the disputed land was demolished, and urged the court to conduct a site visit to ascertain the same.
10. The 2nd Respondent averred that the only construction or demolition works on the suit land are road construction works being undertaken by relevant public bodies on the road reserve.
11. A Supplementary Affidavit was sworn by Margaret Wanjiru Pere who deposed that there were no road constructions being undertaken by government agencies on the disputed land, and no evidence of the same has been provided; that when she reported the demolitions at Rongai Police Station, the workers who were demolishing the houses were arrested and confirmed that they had been instructed to block the road for purposes of undertaking construction and that the 2nd Respondent (Robert Njoroge) has been an agent of the 1st Respondent and acted as such in demolishing the houses on the disputed properties.

Submissions

12. This application was canvassed vide submissions, with only the Applicant's Counsel filing submissions dated October 26, 2022. The Applicant's Counsel submitted that demolitions were indeed conducted with the 1st Respondent's involvement and that the letter attached as MWP-3 with the subject matter 'Road Access Land Parcel Number Ngong/Ngong/3545, indicates that the 1st Respondent sought the intervention of the Survey Office.
13. Counsel submitted that what transpired on May 23, and 24, 2022 follows the same pattern as what transpired in June 2014, when the 3rd Respondent, at the 1st Respondent's instance, purported to demarcate the boundary and paved way for excavation on the disputed portion; that no meeting took place on May 23, 2022 and that the Plaintiff was not notified of such a meeting. It was submitted that in any event, it was illegal for the 3rd Respondent to purport to organize a meeting in contravention of the court orders.
14. The Plaintiff's Counsel submitted that the 2nd Respondent is misdescribed as Njoroge Muguku rather than Robert Njoroge and that this name should be corrected by the court as a matter of course. He urged that this is not a case of suing the wrong party and that it is within the power of the court to grant an order for appropriate amendment without undue regard to technicalities.
15. Counsel relied on Order 8, Rule 3(1) of the *Civil Procedure Rules* which provides that the court may at any stage of the proceedings, and on such terms as may be just, allow any party to amend the pleadings. They also relied on Order 8 Rule 3(3) which provides for amendment to correct the name of a party



notwithstanding that such amendment may substitute a new party, provided the court is satisfied that it was a genuine mistake and would not lead to doubt as to the identity of the person intended to be sued.

16. Counsel relied on the case of *Mecer Alloys Corp vs Rolls Royce Ltd* (1971) ALLER 1520, cited in [Mapendo International vs Metra Investment Ltd & 4 others](#) [2014] eKLR.
17. Counsel for the Plaintiff urged the court to disregard the affidavit by Isaac Njoroge Muguku as the person whom the Plaintiff intended to sue was Robert Njoroge, who was excavating the property in 2014 on behalf of the 1st Respondent.
18. The Plaintiff's Counsel submitted that the Defendants have committed contempt of the court orders dated December 9, 2014 and that their conduct calls for a severe sentence to be imposed. They relied on the cases of [Teachers Service Commission vs Kenya National Union of Teachers & 2 Others](#) [2013] eKLR, [Kenya Tea Growers Association vs Francis Atwoli & 5 Others](#) [2012] eKLR and [Econet Wireless Ltd vs Minister for Information & Communication of Kenya & Another](#) [2005] eKLR.

Analysis and Determination

19. Having considered the application, the Replying Affidavits, the submissions and evidence filed, the following issues arise for this court's determination:
 - a. Whether the Applicant can amend the name of the 2nd Respondent to Robert Njoroge
 - b. Whether the Defendants are in contempt of the orders of the court dated December 9, 2014.
20. Order 8 Rule 3(3) of the Civil Procedure Rules provides for amendment of a name of a party with leave of the court:

“(3) An amendment to correct the name of a party may be allowed under subrule (2) notwithstanding that it is alleged that the effect of the amendment will be to substitute a new party if the court is satisfied that the mistake sought to be corrected was a genuine mistake and was not misleading or such as to cause any reasonable doubt as to the identity of the person intending to sue or intended to be sued.”
21. The Applicant has relied on the decision in *Mecer Alloys Corp vs Rolls Royce Limited* (1971) ALLER 1520, which is quoted with approval in [Mapendo International vs Metra Investment Ltd & 4 Others](#) [2014] eKLR where it was held that;

“The power to amend, particularly, where a party is not a properly described and substitution is necessary to meet the ends of justice, is powerful that the Court has power to do this even after judgment.”
22. The Court of Appeal in [Joseph Ochieng & 2 Others Trading as Aquiline Agencies vs First National Bank of Chicago](#) [1995] eKLR cited the following guiding principles in exercising the powers of amendment:
 - a. powers of the court to allow amendment is to determine the true, substantive merits of the case;
 - b. amendments should be timeously applied for;
 - c. power to so amend can be exercised by the court at any stage of the proceedings (including appeal stages) that as a general rule however late the amendment is



sought to be made it should be allowed if made in good faith provided costs can compensate the other side;

23. In this case, the Plaintiff/Applicant has sought leave to amend the name of the 2nd Respondent. This application has been sought in the early stages of this suit. The Respondents have not pleaded that they will face any injustice by the said amendment nor does it appear that the suggested amendment has been made mala fides. This court therefore allows amendment of the name of the 2nd Respondent/ 2nd Defendant with that of Robert Njoroge.
24. The Applicant has sought that this court find that the Respondents are in contempt of the status quo orders of this court issued on December 9, 2014. Order 40 Rule 3 of the Civil Procedure Rules prescribes the consequences of breach of injunctive orders as follows:
- “Consequence of breach [Order 40, rule 3.]
1. 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.”
25. It is trite that in a matter of contempt, one ought to prove knowledge of the orders of the court as well as establish the alleged contravention of the court’s orders by the contemnor. The burden of proof with respect to contempt is higher than on a balance of probabilities. This Court is guided by decision of the Court of Appeal in Hakika Transport Services Limited vs Kenya Long Distance Truck Drivers & Allied Workers Union (2015) eKLR, where it held as follows:
- “As stated by the Court of Appeal in Mutitika v Baharini Farm limited [1985] KLR 229. 234 as cited in TSC v KNUT, the standard of proof in contempt proceedings must be higher than proof on the balance of probabilities, almost but not exactly, as beyond reasonable doubt.”
26. The Appellate Court has also held that it is sufficient to prove that the advocate of the alleged contemnor was present in court when such orders were made. This was held in Shimmers Plaza Limited vs National Bank of Kenya (2015) eKLR as follows:
- “Would the knowledge of the judgment or order by the advocate of the alleged contemnor suffice for contempt proceedings? We hold the view that it does. This is more so in a case such as this one where the advocate was in Court representing the alleged contemnor and the orders were made in his presence. There is an assumption which is not unfounded, and which in our view is irrefutable to the effect that when an advocate appears in court on instructions of a party, then it behooves him/her to report back to the client all that transpired in court that has a bearing on the client’s case.”
27. In this case, it is not disputed that the Respondents were well aware of the Orders of the Court made on December 9, 2014. The issue to be determined is whether the Applicant has established that the Respondents acted in contravention of the court’s orders.
28. The Applicant has annexed photographs to his Affidavit showing the alleged acts of contempt by the Respondent’s agents. These photographs are duly timed and dated. They however do not show whether the demolished structures are on the disputed land or another property all together.



29. The Plaintiff should have procured the services of a surveyor to prepare a report on the change of the status of the suit property after the alleged demolition of the structures. It is only such a report that would have convinced this court that the demolitions of the structures were in respect of the suit property and not a road reserve or another property all together.
30. The Applicant has further annexed a photograph of (2) individuals, one of whom they allege to be Robert Njoroge, an agent of the 1st Respondent. They have however omitted to present any evidence of the identity of the individual and how he might be related to the 1st Respondent.
31. With respect to the letter from the Survey Office of the Ministry of Lands, the Applicant has invited this court to deduce that the letter, which informed the parties about a site visit, was in contempt of the order of this court. First, there is no evidence that this meeting took place. Second, even if it was established that this meeting took place, such a meeting has not been linked to the alleged contemptuous activities.
32. The upshot of the above is that the Applicant has failed to prove that the Respondents are in contempt of the order of this Court dated December 9, 2014. This application therefore fails in that respect.
33. In the circumstances, the following orders shall issue accordingly:
 - a. Leave is granted to amend the name of the 2nd Defendant/Respondent in the pleadings to read Robert Njoroge.
 - b. The Plaintiff to file the amended Plaint within 14 days.
 - c. Each party to bear his/its own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 27TH DAY OF APRIL, 2023.

O A ANGOTE

JUDGE

In the presence of;

Mr Bwire for 1st and 2nd Defendant

Mr Kabau for Plaintiff

Court Assistant - June

