



Enos & 33 others v Kiarie & another (Environment and Land Case Civil Suit 523 of 2018) [2023] KEELC 17598 (KLR) (25 May 2023) (Ruling)

Neutral citation: [2023] KEELC 17598 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT 523 OF 2018**

**LN MBUGUA, J
MAY 25, 2023**

BETWEEN

REV. BUSELENGETE KAKUMBA ENOS & 33 OTHERS PLAINTIFF

AND

MARY NJERI KIARIE 1ST DEFENDANT

TAFUTA DEVELOPMENT LIMITED 2ND DEFENDANT

RULING

1. There are 2 pending issues for determination before this Court. The 1st issue was raised by counsel for the Plaintiffs on March 8, 2023 at the hearing of the 1st Defendant's case relating to a "notice to produce". The other issue for determination touches on the application for injunction by the plaintiff dated February 15, 2023.

The Notice to produce

2. Counsel for the Plaintiffs claims that they served the 1st Defendant with a notice to produce originals of 2 reports, one of them being a valuation report of the residential property on LR 6845/154 dated July 9, 2007 prepared by circuit valuers management consultants. The one is a report on investigations on persons carrying out developments on LR No. 6845/154 dated June 11, 2011 prepared by Falcons Talas Investigators.
3. It was argued for the Plaintiffs that the said reports can only be in the custody of the 1st Defendant and relate to the subject matter of the suit. He states that none of the Plaintiffs had capacity to produce those reports save by issuing a notice to produce under Section 68 of the *Evidence Act*. He adds that the issues in those reports are matters of fact and they seek to cross-examine the 1st Defendant's witnesses on the said issues.



4. In opposition, counsel for the 1st Defendant argues that the application ought to have been made during the pre-trial stages. He states that Counsel for the Plaintiff's wrote a letter seeking production of the documents in issue when the case was partly heard. He also stated that copies of the documents sought to be produced were produced in a related case being ELC 626/2009 by expert witnesses and judgement was entered by the Court. He argues that the 1st Defendant was the Plaintiff in the said matter and even if she is asked to comment on the documents, she cannot make much of a comment.
5. In his final rejoinder, Counsel for the Plaintiffs told the Court that PW1 was extensively cross-examined on the contents of the judgement issued in ELC 626/2009 on occupation of the suit property thus the reports are relevant to allow cross –examination of the 1st Defendant's witness on the same. He further stated that under the *Evidence Act*, the competent witness to produce any document is either the maker or the person to whom the document was made.
6. I find that midstream of the 1st Defendant's hearing, the Plaintiffs claim that the 1st Defendant failed to comply with the Plaintiff's notice to produce 2 separate reports herein. The issue to determine is; What are the consequence of failure to comply with a notice to produce by a recipient.
7. The Court stated as follows in *Concord Insurance Company Limited (Under Statutory Management) v NIC Bank Limited* [2020] EKLR;

“Failure to comply by the recipient does not attract any censure as suggested by counsel for Concord. It merely gives right to the maker of the Notice to produce the secondary evidence and precludes the recipient from objecting to such production. This Court is unable to accede to the striking out of the Defence for failure of the Defendant to comply with Notice to Produce issued pursuant to Section 69 of the *Evidence Act*”
8. The documents in question were within the conception of the 1st Defendant as admitted thus their production shall not occasion undue prejudice and injustice to the 1st Defendant who apparently failed to adhere to the Notice to produce. However, I note that while the 1st Defendant's counsel admitted to having received a letter requiring him to produce the 2 reports in question, the said notice is not in Court's record. Further, during the case management exercise conducted by this court just before the commencement of the trial on July 19, 2022, the plaintiff's counsel did not raise the issue of the “Notice to produce.” In the premises, I'm of the view that the 2 reports in question can be produced by the Plaintiffs if they so wish. A plaintiff's witness may be recalled for that exercise.

The Application dated February 15, 2023

9. The plaintiffs are seeking interlocutory orders of injunction restraining the 2nd Defendant /agents including one named Wolfgang Richard Mukabana from interfering with the current status of the parcel of land known as LR No. 6845/154 Embakasi III and specifically the portion marked for identification as Plot No. 13 under ownership certificate No. 1135/E3 issued by the 2nd Defendant and claimed by him in this suit.
10. The application is based on grounds on its face and on the 9th Plaintiff's supporting affidavit sworn on February 15, 2023. He avers that he purchased the property known as sub - Plot No.13 situate on LR No. 6845/154 Embakasi III from one Stephen Njuguna Kamau who had in turn earlier purchased it from the 2nd Defendant. The 2nd Defendant then issued him with ownership certificate No. 1135/E3. He then took actual possession and has been actively involved in mobilizing resources to undertake developments to establish common areas of the gated area known as Green View Utawala where the suit land is situated.



11. It is his case that on or round February 12, 2023, one Wolfgang Richard Mukabana invaded the suit land, demolished all structures that he had put up to secure the sub-plot and commenced activities intending to construct a building thereon. He then reported the incident to the OCS Utawala who directed the said Wolfgang Richard Mukabana to halt activities on the suit land.
12. He avers that on February 13, 2023, Mr. Mukabana continued with his activities and when challenged to stop, he produced an ownership certificate alleged to have been issued by the 2nd Defendant on or around 12.22.2021 when this suit was ongoing. He avers that he has partially testified in this matter and is desirous of getting fair judgement thus if the orders sought are not granted, the actions of Wolfgang Richard Mukabana who is not a party to this suit will drastically change the status of his plot.
13. The 1st Defendant is opposed to the application vide her replying affidavit sworn on February 28, 2023. She avers that the 9th Plaintiff bases his possession and ownership of the suit plot on illegality since there is a judgment and decree against the 2nd Defendant in ELC Case No. 626 of 2009, thus any ownership that emanates from the 2nd Defendant cannot stand.
14. The 2nd Defendant did not file a response to the application.
15. I have considered all the arguments raised herein including the rival submissions. The principles of injunctions were enunciated in the case of *Giella v Cassman Brown* (1973) EA 358 and reiterated in the case of *Nguruman Limited v Jan Bonde Nielsen & 2 others* CA No.77 of 2012 [2014] eKLR and I need not rehash the same. It is noted that this suit is at the tale end of its prosecution, with the defence side already having taken to the stand. Secondly, the applicant is seeking orders against a person who is not a party to the suit. It is therefore quite apparent that the prayers sought in the application have the effect of not only delaying the finalization of the case, but may also change the character of the suit. Further, this court has read the judgment in ELC 626 of 2009; the court will desist from giving any orders which may be in conflict with the said judgment at this stage of the trial.
16. In the circumstances, the application dated February 15, 2023 is hereby dismissed and each party to bear their own costs thereof. Parties are directed to focus on the finalization of the suit.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 25TH DAY OF MAY, 2023 THROUGH MICROSOFT TEAMS.

LUCY N. MBUGUA

JUDGE

In the presence of:-

Mrs. Kerio for 1st Defendant

Patrick Rugo for Plaintiff

Court assistant: Eddel

