



Bryant & 47 others v Kaingu & 7 others (Environment & Land Case 222 of 2019 & 141 of 2020 (Consolidated)) [2023] KEELC 18878 (KLR) (19 July 2023) (Ruling)

Neutral citation: [2023] KEELC 18878 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 222 OF 2019 & 141 OF 2020 (CONSOLIDATED)
SM KIBUNJA, J
JULY 19, 2023

BETWEEN

LEAH NTHAMBI BRYANT 1ST PLAINTIFF
WENDY MARIAN MWENDE BRYANT NYAMWEYA 2ND PLAINTIFF
TIMOTHY BRYANT 3RD PLAINTIFF

AND

FREDRICK BARAKA KAINGU 1ST DEFENDANT
CECIL CHARO MAE 2ND DEFENDANT
RHODA ANJWENI OBALA 3RD DEFENDANT
NOLINE AKINYI NYAKURE 4TH DEFENDANT
WILFRED TUMAINI KAINGU 5TH DEFENDANT

AS CONSOLIDATED WITH
ENVIRONMENT & LAND CASE 141 OF 2020

BETWEEN

CECIL CHARO MAE & 44 OTHERS PLAINTIFF

AND

WENDY BRYANT NYAMWEYA & 2 OTHERS DEFENDANT



RULING

1. The plaintiffs moved the court through the notice of motion dated the January 20, 2023 seeking for *inter alia*;
 - a. Order directing Denis Malembeka of Mashariki GeoSurveys Limited and Philip Mulaaa of Philomu Mapping Services to visit the suit premises No 11286/1/MN and 11287/1/MN and prepare a joint ground report identifying any additional structures constructed after their report dated March 3, 2021.
 - b. The OCS Bamburi Police Station to provide sufficient security during the above exercise.
 - c. That based on the joint surveyors' report dated March 3, 2021 and the subsequent one ordered above, the defendants herein and plaintiffs in Mombasa ELC No 141 of 2020 be found to be in contempt of the orders of February 15, 2021 and March 22, 2021.
 - d. That an order be issue that the structures to be identified in the surveyors' report to be prepared as directed above that were constructed after March 3, 2021 be demolished and the costs thereof be met by the defendants herein and the plaintiffs in Mombasa ELC No 141 of 2020.
 - e. The OCS Bamburi Police Station to provide sufficient security during the demolition.
 - f. The costs of the application be provided for.

The application is premised on the ten (10) grounds on its face and supported by the undated affidavit of Leah Nthambi Bryant, the 1st plaintiff, filed with the application. The plaintiffs case is that there is an order for this suit to be heard alongside Mombasa ELC No 141 of 2020. That pursuant to the court order of February 15, 2021, the two named surveyors visited the suit lands and filed a report dated March 3, 2021 that *inter alia* indicated there were 96 adult persons, 19 permanent structures and 14 semi-permanent structures on the suit properties. That the defendants filed a report by one Philip Mulaa dated March 9, 2021 whose contents to a certain extent differed with that prepared by the two surveyors. That on the March 22, 2021 the parties in this suit and Mombasa ELC No 141 of 2020 entered a consent through their counsel to maintain the status quo as per the joint valuation report dated March 3, 2021, pending the hearing and determination of the suits. That on the December 16, 2022 the deponent passed through the road next to the suit properties in a vehicle and saw many structures under construction and many others newly constructed ones covering the whole suit properties and hence the instant application.

2. The application is opposed by the defendants through the replying affidavit of Cecil Charo Mae, the 2nd defendant, sworn on the March 14, 2023 in which he *inter alia* deposes that the plaintiffs' allegations are baseless and that there is no need of another surveyors' report. That any structures not captured in the joint surveyors' report already filed are inconsequential and will not have a bearing on the court's final determination. That as directed by the court on the March 22, 2022, the defendants have not constructed any new structures on the suit property, and cannot be held liable for any new structure that may have been erected on the said land thereafter. That the land is over 200 hectares and the defendants are not in control of all of it. That the orders of March 22, 2022 directed the defendants to stop further construction on the structures which had commenced and erecting new ones, but did not direct them to be responsible for third parties entering or constructing on the land. That a new survey will cause delay and the defendants are not ready to shoulder any related expenses in case the plaintiffs want one done.



3. The court gave directions on filing and exchanging submissions on the March 16, 2023. The learned counsel for the plaintiffs and defendants filed their submissions dated the March 17, 2023 and May 11, 2023 respectively, which the court has considered.
4. The following are the issues for the determinations by the court.
 - a. Whether the plaintiffs have made out a reasonable case for another joint survey to be conducted.
 - b. Whether the plaintiffs have shown that the defendants have disobeyed any of the court orders, and if so whether they should be punished for contempt of court.
 - c. Whether demolition and provision of security orders should issue as prayed.
 - d. Who pays the costs of the application.
5. The court has considered the grounds on the application, affidavit evidence, submissions by the learned counsel for the parties, the superior courts decisions cited and come to the following determinations;
 - a. The proceedings of February 15, 2021 show that the parties had through their counsel agreed for a joint surveyor exercise to be carried out following which the court made the order reproduced herein below;

“Court – given the above, I make the following orders:

1. That the two surveyors of the parties Mr Philip Mulaa and Mr Denis Malembeka to visit the land parcels subdivision No 11286 (original No 274/4) section 1 Mainland North and subdivision No 11287 (original No 274/5) section 1 Mainland North, on Tuesday February 23, 2021 and do the following:
 - a. Mark the boundaries of the two properties and give a ground status report of all the structures in the properties and all the adult persons resident on the properties.
 - b. Identify each structure on the properties and match the same with the name of the occupant.
 - c. Photograph each structure individually and give a description of it.
 - d. Where the occupant allows, photograph him/her alongside his/her structure.
2. Each party to bear the cost of his/her surveyor.
3. The OCS Bamburi to provide adequate security for the exercise.
4. The report be prepared within 10 days of March 23, 2021.
5. Mention for further directions to be on March 11, 2021.”



The joint surveyors' report dated the March 3, 2021 was subsequently filed on the March 11, 2021 and on the March 22, 2021 the counsel for the parties entered a consent that;

“By consent, the current status quo of the suit land as shown in the report be maintained. There be no further construction of structures and no new persons to enter into the suit land pending the hearing and determination of the suit. This file be mentioned on May 12, 2021 alongside ELC No 141 of 2020 for further directions.”

The two orders above are the ones the plaintiffs allege the defendants have disobeyed and in respect of which they should be cited for contempt.

- b. The prayers 3 and 4 of the application that seek for the defendants to be cited for contempt and demolition of the structures constructed on the suit lands after March 3, 2021 are predicated on prospective evidence, that is on a report yet to be ordered for, or made. Simply put, the plaintiffs did not as at the time of filing the application, have any evidence to prove to the standard required that the defendants or any of them have disobeyed any of the two court orders, and none has been tendered so far. The plaintiffs hope that the evidence required will be provided through the report to be filed by the two named surveyors, after prayer 2 is granted. It follows that if the court declines to grant prayer 2, then the plaintiffs will be without such evidence. That further, even if prayer 2 is granted, but the report filed thereof fail to show what the plaintiffs alleges it should, still the plaintiffs will be without evidence of disobedience of court orders attributed to the defendants. The two prayers are non-starters and incapable of being proved in the prosecution of the instant application. It could have been better had the plaintiffs first sought to gather the evidence, and thereafter apply to cite the defendants in view of the level of proof required to succeed. See the decision cited by the learned counsel for the defendants of *Mutitika v Baharini Farm Limited* (1985) eKLR.
- c. The defendants have opposed the plaintiffs' application. They have denied that they have erected any new structures as alleged, and added that they cannot be held liable should third parties have entered onto parts of the 200-hectare suit properties. It is clear that the orders of February 15, 2021 were aimed at essentially documenting the adult persons and structures on the suit properties. The plaintiffs and defendants appointed one surveyor each who carried out the exercise and filed a report whose contents the parties have not disputed. The orders of March 22, 2021 were for the parties to maintain “the current status quo of the suit land as shown in the report”. The order further directed that “There be no further construction of structures and no new persons to enter into the suit land pending the hearing and determination of the suit. This file be mentioned on May 12, 2021 alongside ELC No 141 of 2020 for further directions.” [emphasise mine]. The plaintiffs appear to take the position that the defendants should be liable or responsible for any new entrants and constructions on the suit properties, that may have occurred after those noted in the joint surveyors' report. The defendants disagree, and say they cannot be held responsible for any third parties entering onto the suit properties and their constructions. That after considering the prayers in the parties' pleadings, the court agrees with the defendants, that while the order stopped them from any further constructions and or bringing in any other person(s) on the suit lands, it did not task them with the responsibility of keeping off third parties trespassing thereon. That while the plaintiffs are at liberty to take all legal steps to protect their properties, the court is of the view that the plaintiffs should concentrate in prosecuting their case so that a determination can be made without unnecessary delay, and if the orders to be made thereof will be in their favour,



then they embark in their execution thereof, including against any defendant or person(s) who may have contravened any of the court orders.

- d. The above determinations show that the plaintiffs' application is without merit. In terms with section 27 of the *Civil Procedure Act* chapter 21 of Laws of Kenya, that costs follow the event unless for good cause the court directs otherwise, the defendants are entitled to the costs of the application.
6. Flowing from the foregoing, the court finds the plaintiffs' notice of motion dated the January 20, 2023 is without merit. The application is therefore dismissed with costs.

It is so ordered.

DATED AND VIRTUALLY DELIVERED THIS 19TH DAY OF JULY 2023.

S. M. KIBUNJA, J.

ELC MOMBASA.

