



Kairu Enterprises Limited v Ngecha Properties Limited & another (Environment and Land Case Civil Suit 1064 of 2014) [2023] KEELC 21769 (KLR) (20 November 2023) (Ruling)

Neutral citation: [2023] KEELC 21769 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT 1064 OF 2014
LN MBUGUA, J
NOVEMBER 20, 2023**

BETWEEN

KAIRU ENTERPRISES LIMITED PLAINTIFF

AND

NGECHA PROPERTIES LIMITED 1ST DEFENDANT

JOSEPH MUSIOMA 2ND DEFENDANT

RULING

1. This suit is closely related to Case No. 300 of 2004 of which both matters were scheduled for hearing on 9.10.2023 and 11.10.2023. The cases are not consolidated but they are being heard alongside each other.
2. On 9.10.2023, the court was informed that there are three pending applications; namely;
 1. Application by the plaintiff dated 5.9.2023 for injunction against the defendants;
 2. Application by the plaintiff dated 21.9.2023 for contempt against the defendants.
 3. Application dated 6.9.2023 by intended interested parties to set aside orders of 24.7.2023 dismissing their application to be joined in these proceedings dated 27.6.2023.

Application dated 6.9.2023

3. The intended interested parties identify themselves as Disciples Self Help Project. They pray for reinstatement of their application dated 27.6.2023 to be joined in these proceedings which application was dismissed for none attendance on 24.7.2023.
4. When the application dated 6.9.2023 was presented before me on 6.9.2023, I gave directions for the same to be served for interpartes hearing on 26.9.2023. On 26.9.2023, the court found that there was



no evidence of service hence, the applicants were directed to serve the said application within 3 days and the same was to be heard on 9.10.2023. On 9.10.2023 The court was informed that the application had been served on 2.10.2023 of which the counsel for the applicants insisted that the service was effected within time.

5. The court is supposed to give directions on whether the said application was served within time. However, the court notes that the wider dictates of justice require that the court should go straight to interrogate the question as to whether the application of 27.6.2023 should be brought back to life. See Article 159 (2)(d) of *the Constitution*.
6. Counsel for the applicant contends that he had mis-diarized the date as 24.8.2023 instead of 24.7.2023 in respect of the application dated 27.6.2023.
7. I find that the application dated 27.6.2023 was filed under a certificate of urgency and the court gave directions on the same on 3.7.2023 to the effect that the application was to be served for inter-partes hearing on 24.7.2023. If indeed counsel for the applicant had misdiarized the date as 24.8.2023, then where is the affidavit of service of the “wrong date”!. A perusal of the record reveals that no affidavit of service of which ever date was presented to this court.
8. The common thread running through the Practice Directions of 25.7.2014 Gazette notice no.5178, Practice Directions of 11.1.2022 Gazette Notice No. 189 and Section 1A and 1B of the *Civil Procedure Act* is that courts directions must be obeyed and taken seriously for the court to achieve its Constitutional Mandate as set out under Article 159 (2) (b) on expeditious disposal of cases. Also See *-Evans Omari Sianyo v Nation Media Group Limited* [2011] eKLR, *Alexander Khamisi Mulimi v IEBC & 2 Others* [2018] eKLR, *Moschion v Mwangi* (Environment & Land Case No. 360 of 2018) 2023 KEELC 17/44 (KLR) (27.4.2023) Ruling.
9. The court has also taken into consideration that the parties herein as well as the intended interested parties are parties in the Case No. 300 of 2004 which suit is being heard alongside this case. It follows that the intended interested parties will be appraised of whatever is happening in this particular case.
10. I have also taken into account the age of the two matters which are now aged 19 and 9 years respectively. Pre trial directions have duly been taken and the matters are at the hearing stage. There is a need to focus on the finalization of the disputes once and for all.
11. The end result is that the application dated 6.9.2023 is found to have no merits, the same is dismissed with no orders as to costs.

Applications dated 5.9.2023 and 21.9.2023

12. In the application dated 5.9.2023, the plaintiffs are seeking an order of injunction restraining the Defendants from interfering with its occupation of 107 unserviced plots situated within Title Number Nairobi/Block 82/2711 also known as Mara Savannah Estate pending hearing and determination of the suit as well as orders that the OCS and DCI Buru Buru Police Station do enforce compliance.
13. The application is premised on grounds on its face and on the supporting affidavit of the Plaintiff’s director one Patrick Munene sworn on 5.9.2023. He avers that on or about 31.8.2023, 19 years after the purported sale transaction of parcel Nairobi /Block 82/2711, the Defendants unlawfully entered onto the suit property and began to carry out civil works by excavating roads and back filling the excavated road with murrum which if allowed to continue will cause severe environmental degradation thereby permanently altering the nature and character of the suit property. That such works may also potentially deceive unsuspecting 3rd party buyers into purchasing plots, consequently leading to further complexities in the matter.



14. The application is opposed by the Defendants vide the replying affidavit sworn on 20.9.2023 by the 2nd Defendant. He argues that the 1st Defendant should be allowed to complete the civil works as they improve the suit property to the benefit of whoever will be declared to be the owner and for reasons that if left as it is, the property and its surroundings might flood as the 1st Defendant was in the process of connecting the sewerage line to the main sewerage line for Nairobi County.
15. It was argued that the 1st Defendant has expended colossal amounts on civil works which it has been carrying out on the suit property. Adding that on 21.2.2005, the 1st defendant was allowed to carry out the civil works vide the court order in Case No. 300 of 2004.
16. In rejoinder, the Plaintiff filed a replying affidavit sworn on 25.9.2023 raising issues relating to the sale transaction of the suit property.
17. In the Plaintiff's submissions dated 25.9.2023, they cited the case of *Mount Robbin Limited v Ali Salim Toza* [2022] eKLR to submit that the nature of the trespass perpetuated by the Defendant will cause the Plaintiff irreparable damage. It was also submitted that the balance of convenience tilts towards preserving the property and maintaining status quo, and to this end, the case of *Virginia Edith Wambui v Joash Ochieng Ougo* [1987] KLR was proffered.
18. On their part, the Defendants filed submissions dated 25.9.2023, where they cited the case of *Joseph Hinga Gati v Barclays Bank (k) Ltd* [2001] eKLR to submit that the Plaintiff is undeserving of the equitable remedy of an injunction for material non –disclosure of the existence of a court order permitting the Defendants to carry out civil work on the suit property. Adding that the Defendants have been carrying out civil works on the suit property for the last 20 years. The case of *Joshua Ngatu v Jane Mpinda & 3 others* [2019] eKLR was relied upon.
19. I have considered all the rival arguments. The genesis of the dispute is a sale agreement dated 14.11.2003 between the Plaintiff and the 1st Defendant. The issues relating to the aforementioned transaction are hotly contested to the extent that the parties were actually adducing evidence in the platform of the current applications; with the plaintiff claiming that the said agreement did not crystallize, while the defendants are of a contrary opinion.
20. However, the nature and extent of the fulfilment of the parties obligations in the aforementioned agreement shall not be a subject of contest in the ruling at hand, for the very reason that the case is now almost 10 years old, and the hearing is underway. Thus the parties should reserve their arguments to await the proper platform which is the main trial.
21. However, it has become apparent that the defendants have commenced some works on the suit property. The defendants have admitted that much, save to say that the same has been ongoing for the last 20 years.
22. The question begging for an answer is; What are these works that the defendants have been carrying out for the last 20 years?.
23. It is noted that the Deputy Registrar of this court had visited the scene pursuant to directions of the court and she noted that there was freshly dug out excavations with signs of construction at the infancy stage. This buttresses the averments made by the plaintiff that the defendants only commenced the works recently.
24. I find that the excavation and digging being done many years after the suit(s) were filed could entirely change the character of the suit land.



25. All these circumstances call for status quo in order to protect the subject matter of the suit. In the circumstances, the application dated 5.9.2023 is allowed to the extent that no further constructions shall be undertaken by the defendants on the suit property. Each party shall bear their own costs of the said application.
26. The other application filed by the Plaintiff dated 21.9.2023 seeks an order that the Defendants be cited for contempt for disobedience and defiance of the orders issued on 6.9.2023, and that the defendants be committed to civil jail until they purge the contempt.
27. The application is based on grounds on its face and on the supporting affidavit of Patrick Munene sworn on 21.9.2023. He goes on and on as to how the sale agreement dated 14.11.2003 between the Plaintiff and the 1st Defendant had lapsed, but the Defendants had started to excavate the land. They aver that the court issued an order on 6.9.2023 halting any further construction, but there was no compliance.
28. The application is opposed by the Defendants vide the 2nd Defendant's replying affidavit sworn on 18.10.2023. They equally give a lengthy account of why they were carrying out works on the site including reliance on orders given in case No. 300 of 2004 to justify their actions. They contend that they were informed of the court order on 8.9.2023 by their advocates and immediately, they ceased all construction on parcel 82/2711.
29. On 6.9.2023, this court ordered that no construction is to be undertaken on the suit property and that the suit property shall not be alienated. The Defendants admit that they were served with the said orders on 8.9.2023 and immediately ceased carrying out civil works thereon.
30. I have considered the material presented before this court. In *James Gachiri Mwangi v John Waweru Muriuki & 3 others* [2020] eKLR, the court emphasized the need to prove facts relied while alleging contempt of court orders.
31. The plaintiff availed photographs of construction materials which have been placed on the land. The Deputy registrar's site visit report dated 9.10.2023 indicates that there was construction works at the suit premises and that the same was at the infancy stage. She also observed that the land had been freshly dug out.
32. The question I pose is; Didn't the defendants find it necessary to take photographs of the site, the moment they allegedly ceased construction in light of the issues raised in the application dated 5.9.2021 and the orders issued on 6.9.2023?. I am not convinced that the defendants are innocent in so far as the order of 6.9.2023 is concerned.
33. Nevertheless, this court is now seized of the true picture on the ground, going by the report of the Deputy Registrar and the photographs availed by the plaintiffs. This court is also conscious of the need to keep all the parties on track, now that the suits are at the hearing stage. I find that for one reason or another, the propensity to be derailed in the trial appears to be rather strong in this dispute. Holding the defendants in contempt at this stage will only exacerbate an already frenetic situation.
34. To this end, the defendants will get away with a warning, that they must respect court orders particularly now that the court has a sneak preview of how the ground looks like and they have made an indication of stopping all further construction.
35. The court will however not hesitate to assert its authority in the event of disobedience of court orders and directions in future. Finally, I will re-emphasize again that the parties should focus on



the resolution of the dispute by focusing on the main trial instead of litigating the substantive issues through interlocutory applications.

36. In the end, the application dated 21.9.2023 is marked as spent with no orders as to costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 20TH DAY OF NOVEMBER, 2023
THROUGH MICROSOFT TEAMS.**

LUCY N. MBUGUA

JUDGE

In the presence of:-

Njuguna for the Plaintiff

Angwenyi for Defendant

Osoro for Intended Interested Party

Court Assistant: June

