



REPUBLIC OF KENYA



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**Akeyo & another v Lake Basin Development Authority (Environment and Land
Case Civil Suit 3 of 2020) [2025] KEELC 207 (KLR) (27 January 2025) (Ruling)**

Neutral citation: [2025] KEELC 207 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND CASE CIVIL SUIT 3 OF 2020
SO OKONG'O, J
JANUARY 27, 2025**

BETWEEN

HARUN OMOM OKAL AKEYO 1ST PLAINTIFF

DAVID OKAL OMOM 2ND PLAINTIFF

AND

LAKE BASIN DEVELOPMENT AUTHORITY DEFENDANT

RULING

1. The full facts of this case are set out in the judgment delivered by this court on 6th November 2023. The Plaintiffs brought this suit against the Defendant through a plaint dated 12th September 2012 which was amended on 25th May 2016. In the amended plaint, the Plaintiffs sought the following reliefs;
 1. A declaration that the Plaintiffs were the absolute proprietors of all those parcels of land known as Kisumu/Tonde/91, Kisumu/Tonde/92 and Kisumu/Tonde/128 (hereinafter together referred to as “the suit properties” and individually as “Plot Nos. 91,92 and 128” respectively).
 2. A permanent injunction restraining the Defendant by itself, its servants, representatives, assigns and agents from interfering or in any way dealing with the suit properties.
 3. Costs of the suit.
2. The Plaintiffs averred that the 1st Plaintiff was the registered proprietor of Plot No. 91 and Plot No. 128 while the 2nd Plaintiff was the registered proprietor of Plot No.92. The Plaintiffs averred that between 7th March 2011 and 7th June 2011 while the Plaintiffs were ploughing the suit properties to plant sugar cane thereon, the Defendant interfered with the said activity claiming that it was the proprietor of the said properties. The Plaintiffs averred that the said acts of interference by the Defendant amounted to trespass on the suit properties.



3. The Defendant filed a statement of defence and counterclaim on 19th February 2013 which it amended on 7th June 2016. The Defendant denied that the Plaintiffs were the registered proprietors of the suit properties. The Defendant averred that if at all the Plaintiffs caused themselves to be registered as the proprietors of the suit properties, such registration was procured illegally and fraudulently since the suit properties were public land set aside for the Defendant's use. The Defendant averred that the titles held by the Plaintiffs in respect of the suit properties were illegal, null and void.
4. The Defendant denied that it had stopped the Plaintiffs' farming activities on the suit properties. The Defendant averred that since the suit properties had been set aside for use by the Defendant, the same was always occupied and used by the Defendant. The Defendant averred that the suit properties were a portion of the hitherto larger parcel of land measuring 345.40 acres registered in the name of Settlement Fund Trustees but set aside for use by the Defendant. The Defendant averred that the Plaintiffs were not entitled to the reliefs sought in the amended plaint.
5. In its counterclaim, the Defendant reiterated the contents of its defence and averred that the process leading to the registration of the Plaintiffs as the owners of the suit properties was tainted with irregularities and illegalities that vitiated the titles held by the Plaintiffs. The Defendant sought judgment against the Plaintiffs for;
 1. A declaration that the process leading to the registration of the Plaintiffs as the proprietors of the suit properties was illegal and hence the titles held by the Plaintiffs in respect of the suit properties were null and void.
 2. An order that the titles issued to the Plaintiffs in respect of the suit properties be cancelled and the said properties do revert to the ownership of Settlement Fund Trustees.
 3. Costs of the counterclaim.
6. The Plaintiffs filed a reply to defence and defence to counterclaim on 1st August 2016. The Plaintiffs denied that they acquired the suit properties illegally and fraudulently and that their titles to the said properties were null and void. The Plaintiffs averred that they acquired the suit properties legally and procedurally. The Plaintiffs denied that they misrepresented to the Settlement Fund Trustees that they were needy squatters on the suit properties and that they needed to be settled. In their defence to the counter-claim, the Plaintiffs averred that they acquired the suit properties legally and procedurally and as such, the titles that were issued to them were lawful and conferred upon them valid proprietary rights over the properties. The Defendant filed a reply to the Plaintiffs' defence to counterclaim on 2nd August 2016. The Defendant joined issue with the Plaintiffs in their defence to counterclaim.
7. The court heard the main suit and the counter-claim and delivered a judgment on 6th November 2023. In the judgment, the court framed the following issues for determination;
 1. Whether the Plaintiffs acquired the suit properties lawfully and held valid titles in respect thereof.
 2. Whether the Plaintiffs were entitled to the reliefs sought in their amended plaint.
 3. Whether the Defendant was entitled to the reliefs sought in its counter-claim.
 4. Who was liable for the costs of the suit and the counterclaim?



8. On the first issue, the court held that the Plaintiffs had proved that they were the registered proprietors of the suit properties and that the Defendant failed to prove that the suit properties were created from the land that was reserved for its use. The court stated that:

“The burden was on the Defendant to establish that the suit properties were created within the 130-acre portion of the Holding Ground that was set apart for it. The Defendant did not produce evidence showing the location of its 130-acre portion of land vis-a-vis the suit properties. It was until the tail end of his testimony while being examined by the court that the Defendant’s witness told the court that the suit properties formed part of the 130-acre portion of the Holding Ground that was given to the Defendant during the meeting held on 12th May 1994. The Defendant however produced no evidence to back up this claim. It is my finding that the Defendant is entitled to land measuring 130 acres of what was formerly the Holding Ground. It is also my finding that the Plaintiffs were not entitled to be settled on the Holding Ground since they were not squatters. I am however not sure as to which portion of the Holding Ground the suit properties are situated. The Defendant has not convinced me that the suit properties are within the 130-acre portion of the Holding Ground that was set apart for them. Although the Plaintiffs were not genuine squatters and as such were not entitled to benefit from land set aside for squatters, it was not for the Defendant to fight for the rights of the squatters...In the absence of evidence that the suit properties were created from the Defendant’s parcel of land, I have no reason to hold in a suit by the Defendant that the properties were acquired by the Plaintiffs unlawfully and that the titles held by them are null and void.”

9. On the second issue, the court stated that having found that the Plaintiffs and the persons from whom they purchased two of the suit properties were neither squatters nor persons in need of settlement in terms of the agreement that was reached in the meeting held on 12th May 1994, the Plaintiffs were not entitled to be allocated land where the suit properties were situated. The court therefore declined to declare the Plaintiffs the absolute proprietors of the suit properties. The court was of the view however that the Plaintiffs were entitled to an injunction restraining the Defendant who had not established any valid interest in the suit properties from interfering with their possession and use of the said properties.
10. On the third issue, the court held that the Defendant had not persuaded the court that it had any interest in the suit properties. The court therefore found no merit in the Defendant’s counter-claim. In conclusion, the court made the following orders in the matter;
- a. An order of injunction restraining the Defendant whether by itself, its servants, employees, representatives or agents from interfering or in any way dealing with the parcels of land known as Kisumu/Tonde/91, Kisumu/Tonde/92 and Kisumu/Tonde/128.
 - b. The Defendant’s counter-claim was dismissed.
 - c. Each party was to bear its costs of the suit and the counter-claim.
11. What is now before the court is the Plaintiffs’ application dated 1st July 2024 seeking the following orders;
1. That the court adopts the Surveyor’s report dated 13th March 2024 as the report of the court.
 2. That upon the adoption of the report, the Defendant/Judgment debtor be ordered to remove the offensive poles from the Plaintiffs’ parcels of land.



3. That in the alternative, the Defendant be ordered to deposit a sum of Kshs. 500,000/- in court as security for the costs of carrying out the exercise.
 4. That the Defendant be ordered to reimburse the Plaintiffs the sum of Kshs. 60,000/- being the fees incurred in conducting survey.
 5. That the Defendant be committed to civil jail for 6 months for disobedience of the court order issued on 6th November 2023.
 6. That the court does issue an order for the Defendant to bring down the fence and any structures put up around the suit properties forthwith.
 7. That the costs of the application be provided for.
12. The application that was supported by the affidavit and supplementary affidavit sworn by the 1st Plaintiff on 3rd July 2024 and 8th July 2024 respectively was brought on the grounds that; on 6th November 2023 the court issued an order restraining the Defendant from interfering or in any way dealing with the suit properties and that despite the order, the Defendant had continued to interfere with the properties by putting up a fence and hindering the Plaintiffs' access to and enjoyment of the suit properties. The Plaintiffs averred that the Defendant was in contempt of the said court order. The Plaintiffs averred that they had a survey report dated 13th March 2024 prepared by a private surveyor which showed that the Defendant had refused to remove the offensive fence from the suit properties. The Plaintiff averred that they paid the said surveyor Kshs. 60,000/- as his fees.
 13. The Defendant opposed the application through grounds of opposition dated 28th September 2024 and a replying affidavit sworn by Michael Okuk on 2nd October 2024. In the grounds of opposition, the Defendant contended that the Plaintiffs' application was frivolous and vexatious. The Defendant averred that the orders sought were incapable of being granted since the court was functus officio. In its replying affidavit, the Defendant averred that in the judgment delivered on 6th November 2023, the court did not find the titles held by the Plaintiffs over the suit properties to be valid. The Defendant averred that as a result of that finding by the court, the Plaintiffs filed an appeal against the court's judgment to the Court of Appeal. The Defendant averred that the fence complained of by the Plaintiffs was erected by the Defendant several years before the suit was filed and judgment of the court delivered. The Defendant averred that it was important that the Defendant ascertain the position of the beacons to enable it to confirm if there was any encroachment and the extent thereof. The Defendant averred that it was after that exercise that the fence could be moved to conform with the position of the beacons. The Defendant averred that it was not liable to refund the cost of the survey that was conducted by the Plaintiffs. The Defendant averred further that it was not served with a penal notice and that the Plaintiffs' application was based on the law of contempt that was declared unconstitutional. The Defendant urged the court to dismiss the application.
 14. The Plaintiffs filed a further affidavit dated 18th October 2024 in response to the Defendant's replying affidavit. The Plaintiffs reiterated that the orders granted by the court on 6th November 2023 restrained the Defendant from interfering with the suit properties. The Plaintiffs averred that despite the said orders, the Defendant had continued to use the suit properties as it pleased. The Plaintiffs averred that the Defendant had refused to comply with the said court order and as such it was in contempt of court.
 15. The application was argued by way of written submissions. The Plaintiffs filed submissions dated 2nd December 2024 while the Defendant did not file submissions.
 16. I have considered the Plaintiffs' application together with the affidavits filed in support thereof. I have also considered the grounds of opposition and the replying affidavit filed by the Defendant in



opposition to the application. Before the filing of the present application, the Plaintiffs had filed an earlier application dated 29th January 2024 on 8th February 2024 seeking an order to commit the Defendant to civil jail for disobeying the orders of this court made on 6th November 2023. The Plaintiffs also sought in the said application an order that the Defendant bring down forthwith its fence that was blocking the Plaintiffs' access to the suit properties. The application was opposed by the Defendant through grounds of opposition and a replying affidavit both dated 29th February 2024. When the said application came up for hearing on 4th March 2024, the parties agreed that it was necessary to conduct a joint survey to confirm the boundaries of the suit properties and if there was any encroachment thereon by the Defendant.

17. Since the Defendant was cagey over the costs for the survey while the Plaintiffs wanted the exercise to be undertaken, the court granted leave to the Plaintiffs to survey the suit properties through a private surveyor or a Government Surveyor to ascertain if there was any encroachment thereon by the Defendant. The Plaintiffs were ordered to meet the costs of the survey and to involve the Defendant in the exercise. It was following that order made on 4th March 2024 that the Plaintiffs engaged Patrick Opiyo Adero a licensed land surveyor to undertake the survey exercise. According to the survey report prepared by the said surveyor dated 13th March 2024, the Defendant owned land parcel No. 113 in Tonde Settlement Scheme Registry Index Map Diagram 1. The surveyor stated that two of the suit properties, Parcel Nos. 91 and 92 which are within the same settlement scheme are on the northern part of the Defendant's parcel No. 113 and there are seven parcels of land between the Defendant's parcel of land and the two parcels of land claimed by the Plaintiffs. In his observations, the surveyor stated that the Defendant's fence put up around parcel No. 113 was extended by the Defendant to cover among others, the two parcels of land, Parcel No. 91 and Parcel No. 92 claimed by the Plaintiffs. The surveyor drew a sketch map showing the Defendant's fence around the Defendant's parcel No. 113 and its extension to include among others Parcel Nos. 91 and 92 claimed by the Plaintiffs. In summary, Patrick Opiyo's report has confirmed that the Defendant's fence has encroached on land parcels No. 91 and No. 92 claimed by the Plaintiffs.
18. In its judgment delivered herein on 6th November 2023, the court issued an order of injunction restraining the Defendant whether by itself, its servants, employees, representatives or agents from interfering or in any way dealing with the parcels of land known as Kisumu/Tonde/91, Kisumu/Tonde/92 and Kisumu/Tonde/128. It cannot be disputed that fencing off or continued fencing off of the parcels of land Kisumu/Tonde/91 and Kisumu/Tonde/92 is interfering with the Plaintiffs' access and use of the said parcels of land. I agree that the court did not validate the Plaintiff's ownership of these parcels of land. The court nevertheless stopped the Defendant from interfering with the two parcels of land because the Defendant did not establish that it had a better title or interest in the properties. In the circumstances, the Defendant has no alternative but to comply with the court order. I will not consider punishing the Defendant at this stage. As I have mentioned earlier, there was a need to conduct a survey to confirm the encroachment complained of by the Defendant. Now that the encroachment has been confirmed, I will first give the Defendant an opportunity to stop the encroachment or the interference complained of. If the Defendant fails to comply, the court can be moved to issue coercive orders.
193. That being my view on the matter, I hereby make the following orders in the Plaintiffs' Notice of Motion application dated 1st July 2024;
 1. The Defendant shall within 60 days from the date hereof remove its existing fence around Kisumu/Tonde/91 and Kisumu/Tonde/92.



2. If the said fence is not removed by the Defendant within 60 days from the date hereof, the Plaintiffs shall be at liberty to remove the same at the cost of the Defendant which costs shall be assessed and certified by the Deputy Registrar of this court and shall be paid by the Defendant within 30 days of such certification.
3. The Officer Commanding Muhoroni Police station (O.C.S) shall provide the Plaintiffs with security if necessary while removing the said fence around the two parcels of land.
4. The Plaintiffs' prayer for reimbursement of the sum of Kshs. 60,000/- paid to the surveyor is refused since the court had directed that the survey be undertaken at the Plaintiffs' cost.
5. The Defendant shall pay the costs of the application.

DELIVERED AND DATED AT KISUMU ON THIS 27TH DAY OF JANUARY 2025.

S.OKONG'O

JUDGE

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of;

Mr. Mwamu for the Plaintiffs

Mr. Yogo for the Defendant

Ms. J. Omondi-Court Assistant

