



REPUBLIC OF KENYA



**Maina v Gathiri (Environment & Land Case 38 of 2015)  
[2022] KEELC 3846 (KLR) (28 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 3846 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NYERI  
ENVIRONMENT & LAND CASE 38 OF 2015**

**JO OLOLA, J  
JULY 28, 2022**

**BETWEEN**

**GRACE WANGECHI MAINA ..... PLAINTIFF**

**AND**

**EUSTACE HINGA GATHIRI ..... DEFENDANT**

**RULING**

1. By this Notice of Motion dated 23<sup>rd</sup> July 2021, Eustace Hinga Gathiri (the Defendant) prays for an order that this Honourable Court be pleased to set aside the orders made on 28<sup>th</sup> March, 2019 and allow the Parties to adduce oral evidence in Court.
2. The application which is supported by an Affidavit sworn by the Defendant is premised on the grounds that:
  - (i) Although the parties had complied with Order 11 of the *Civil Procedure Rules* on 12<sup>th</sup> May 2016, they agreed to refer the dispute to the County Land Registrar;
  - (ii) The County Land Registrar was to determine whether the Defendant was occupying the Plaintiff's land;
  - (iii) The Land Registrar's Report was filed in Court and she was cross-examined on it;
  - (iv) The Defendant's Counsel has filed submissions opposing the adoption of the Report;
  - (v) Although the parties closed the case on 28<sup>th</sup> March 2019, there is need for the parties to adduce oral evidence and produce documents;
  - (vi) The Defendant has filed Witness Statements and it is mete and just that the witnesses be allowed to adduce their evidence; and



- (vii) That although the case is closed the said order should be set aside in the interest of justice so that the County Land Registrar's Report forms part of the residence instead of reliance being placed solely on it.
3. Grace Wangechi Maina (the Plaintiff) is however opposed to the grant of the orders sought. In her Replying Affidavit sworn on 13<sup>th</sup> August, 2021 but filed herein on 13<sup>th</sup> September, 2021 the Plaintiff avers that the application is a belated attempt by the Defendant to ensure that he unlawfully continues occupying the Plaintiff's land despite the technical input of the Land Registrar and the Surveyor.
  4. The Plaintiff avers that owing to the nature of the dispute, it was the view of all the parties and the Court that to resolve the issue with finality it was only fair that persons versed with the technical knowledge visit the land, mark the boundaries and prepare the necessary Report.
  5. The Plaintiff further avers that the order by the Court was by consent of all the Parties and thereafter the Land Registrar and Surveyor visited the suit lands in the presence of both parties and prepared a Report. The mere fact that a party is not satisfied by the Report is not a reason why the Court should vacate orders entered into by consent.
  6. I have carefully perused and considered the application as well as the response thereto. I have similarly perused and considered the rival submissions and authorities placed before me by the Learned Advocates representing the parties herein.
  7. The Defendant herein has urged the Court to set aside the orders herein made on 28<sup>th</sup> March, 2019 and to allow the parties to adduce oral evidence in Court. The Plaintiff on its part is opposed to the application and avers that by the present application, the Defendant wants to prolong his wrongful occupation of the Plaintiff's parcel of land.
  8. The orders sought to be set aside were the orders closing the hearing of this case after the Land Registrar had testified and produced in Court a Report dated 10<sup>th</sup> July, 2017 in regard to the parcels of land known as Gatarakwa/Gatarakwa/Block II/351 and 352. It is the Defendant's case that in addition to the Land Registrar's Report, they had filed other Witness Statements and that rather than relying solely on the Technical Report, the Court should consider the additional evidence that would outline the history of the dispute.
  9. The Plaintiff on the other hand contends that the said orders were given by the consent of the parties and that there was no fraud or coercion on the part of either party when the consent was entered into to warrant the setting aside of the orders.
  10. While the orders made on 28<sup>th</sup> March, 2019 could not in the strict sense be said to have been issued by consent, they were the result of orders made by the Court earlier on 12<sup>th</sup> May, 2016. On that date, the Honourable Lady Justice Waithaka then seized of the matter stated on record as follows:

“ Court:

From the Plaintiff, it is clear that this is a case where the Plaintiff claims that the defendant had encroached on his parcel of land. I am of the opinion that parties should consider allowing the District Land Registrar and Surveyor to visit the suit property and establish whether there is any encroachment by the defendant.”



11. Both counsels appearing for the parties had no objection to the suggestion and the Court then directed as follows:

“By consent the Nyeri Land Registrar to visit Gatarakwa/Gatarakwa/Block II/1956 (sic) within 30 days in the presence of the Plaintiff and the defendant and establish whether the Defendant’s semi-permanent house has been erected on any portion of the Plaintiff’s land and if so to what extent.

The Nyeri County Land Registrar and Land Surveyor shall file their Report within 14 days of the site visit.”

12. While those orders were certainly meant to expedite the proceedings herein, I did not see from the perusal thereof where the parties expressly agreed that they would discard other evidence and rely solely on the Technical Report of the Land Registrar.

13. As at the time the Land Registrar was directed to visit the locus in quo and to present a Report in Court, the parties had already filed and exchanged their Witness Statements and other documents and were prepared for the hearing of the case by way of oral evidence. Accordingly, I did not think the Plaintiff would be prejudiced in any way if the evidence on record were tendered orally to enable the Court take the same on board in arriving at its decision.

14. It follows that I am persuaded that there is merit in the Motion dated 23<sup>rd</sup> July, 2021. The same is allowed with the costs in the cause.

**RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT NYERI THIS 28<sup>TH</sup> DAY OF JULY, 2022.**

**In the presence of:**

Mr. Wahome Gikonyo holding brief for Kiminda for the Plaintiff

No appearance for the Defendant

Court assistant - Kendi

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**J. O. Olola**

**JUDGE**

