



REPUBLIC OF KENYA



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**Kiboi v (Deceased) & another (Environment & Land Case 511 of 2017)
[2022] KEELC 12769 (KLR) (22 September 2022) (Ruling)**

Neutral citation: [2022] KEELC 12769 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU
ENVIRONMENT & LAND CASE 511 OF 2017
YM ANGIMA, J
SEPTEMBER 22, 2022**

BETWEEN

STEPHEN NJOROGE KIBOI PLAINTIFF

AND

DANIEL NGULI KYALO (DECEASED 1ST DEFENDANT

MASAI ITUMO (DECEASED) 2ND DEFENDANT

RULING

A. Introduction

1. By a notice of motion dated March 10, 2021 brought under sections 1, 1B, 3, 3A of the *Civil Procedure Act* (cap 21) order 40 rules 1, 2, 3 & 4 of the *Civil Procedure Rules* and all other enabling provisions of the law, the defendants sought the following orders:
 - a. spent;
 - b. spent;
 - c. spent;
 - d. That the status quo be maintained till the survey and demarcation of the parcel of land is done pursuant to the decree herein;
 - e. That a qualified surveyor/county surveyor do visit LR Nos Laikipia/Nyahururu/1945 and 1950 to subdivide the parcels as per the decree of the court dated December 19, 2019;
 - f. That the OCS Losogwa police station do ensure compliance;



g. Costs of the application.

2. The said application was supported by the grounds set out on the face of the motion and the contents of the supporting affidavit sworn by David Mwale Nguli on March 10, 2021 and the exhibits thereto. The purpose of the application was essentially to facilitate enforcement of the decree dated July 9, 2019 against plaintiff. It was contended that the plaintiff has failed to take steps to comply with the terms of the decree which had required him to sub-divide and transfer an identifiable portion of the suit property to the defendants but had instead resorted to clear new areas and expand his occupation of the suit property in violation of the decree.
3. The record shows that by a consent recorded on June 24, 2021 the parties agreed to have order Nos (d), (e) and (f) granted subject to the qualification that the sub-division should be done by the county land surveyor, Laikipia county.

B. The Defendants' Instant Application

4. It would appear that the above orders were not implemented hence the defendants filed a notice of motion dated March 28, 2021 under order 40 rule 3 of the *Civil Procedure Rules, 2010* section 3A of the *Civil Procedure Act* (cap 21) and all enabling provisions of the law to seeking to have the plaintiff and the county Surveyor Nyahururu one, MK Kariuki cited for contempt of the court order of June 24, 2021. The said application was based upon the grounds set out on the face of the motion and the contents of the supporting affidavit sworn by David Mwale Nguli on March 28, 2021 and the exhibits thereto. It was contended that the plaintiff and the county land surveyor Nyahururu were duly served with the court order dated June 24, 2021 but had wilfully disobeyed the same without just cause or excuse.
5. The defendants contended that although the land surveyor had initially scheduled the sub-division to take place on February 23, 2022 the plaintiff's advocates had written a letter to the surveyor asking him to stop the exercise for lack of jurisdiction. It was further contended that the plaintiff had continued to clear new bushes and expand his area of occupation despite the existence of a status quo order in this matter. The defendants exhibited copies of photographs in support of this allegation in the supporting affidavit. The defendants consequently urged the court to allow the application and to punish the plaintiff for contempt of court.

C. The Response To The Application

6. The plaintiff filed a replying affidavit sworn by his advocate Mr Charles Gakuhi Chege on April 22, 2022 in opposition to the application. It was contended that the application was incompetent, bad in law and merely intended to harass and scandalize the plaintiff and the land surveyor Nyahururu. It was contended that the order as extracted by the defendants did not comply with the terms of the consent recorded on June 24, 2021 which required the county surveyor Laikipia county and not the surveyor at Nyahururu to implement the order. The plaintiff, therefore, contended that the land surveyor at Nyahururu had no jurisdiction to undertake the sub-division since the order was directed to a different surveyor.
7. The court has noted that the county land surveyor Laikipia was not served with the application since it was the land surveyor at Nyahururu who was served. The court has further noted that the plaintiff did not respond to the allegation that he was cultivating new grounds and expanding his occupation of the suit property in violation of the status quo order recorded by consent on June 24, 2021.



D. The Defendant's Rejoinder

8. The defendants filed a further affidavit sworn on May 4, 2021 sworn by David Mwale Nguli in reply to the plaintiff's replying affidavit. They denied that the instant application was incompetent, bad in law and intended to scandalize the plaintiff and the land surveyor, Nyahururu. It was contended that the plaintiff had no authority to speak on behalf of the surveyor. The defendants insisted that the consent order of June 24, 2021 required the surveyor at Nyahururu to undertake the sub-division. The defendants further disputed that the land surveyor at Nyahururu had no jurisdiction in the matter and that the plaintiff was merely out to frustrate implementation of the orders made on June 24, 2021.

E. Directions On Submissions

9. When the application was listed for inter partes hearing it was directed that the same shall be canvassed through written submissions. The parties were given timelines within which to file and exchange their written submissions. The record shows that the defendants filed their submissions on May 9, 2022 but the plaintiff chose to rely entirely upon the replying affidavit on record.

F. The Issues For Determination

10. The court has considered the notice of motion dated March 28, 2021, the plaintiff's replying affidavit in opposition thereto as well as the defendants' further affidavit. The court is of the opinion that the following key issues arise for determination herein:
 - a. Whether the defendants have proved the contempt alleged against the land surveyor, Nyahururu.
 - b. Whether the defendants have proved the contempt alleged against the plaintiff.
 - c. Whether the defendants are entitled to the orders sought in the application.

G. Analysis And Determination

- a. Whether the defendants have proved the contempt alleged against the land surveyor, Nyahururu
11. The court has considered the submissions and material on record on this issue. It is apparent from the material on record that the terms of the consent order dated June 24, 2021 had nothing to do with MK Kamau the land surveyor – Nyahururu. The record simply indicates that by consent of the parties the sub-division was to be undertaken by the county land surveyor – Laikipia county. There is no evidence on record to demonstrate that the land surveyor for Laikipia county was ever served with the order made on June 24, 2021 or that he was ever served with the instant application. The court finds no justification for dragging the land surveyor at Nyahururu whose area of jurisdiction is probably Nyandarua county into the proceedings whereas the suit property is located within Laikipia county and the relevant order was not directed to him. Accordingly, the court finds and holds that the defendants have failed to prove the alleged contempt of court order against the land surveyor based at Nyahururu.
 - b. Whether the defendants have proved the contempt alleged against the plaintiff
12. The court has considered the submissions and material on record on this issue. The main reason why the defendants considered the plaintiff to be in contempt of the court order of June 24, 2021 was that he had continued to clear and cultivate new areas in order to expand his area of occupation in violation of



the status quo orders made on June 24, 2021. The defendants exhibited copies of photographs showing the new areas allegedly cultivated by the plaintiff.

13. Although the plaintiff's advocate filed an affidavit in response to the application, he did not specifically respond to the issue of cultivating new grounds during the pendency of the status quo orders. The court is, however, aware that the burden of proof rests upon the defendants to prove the alleged contempt. So, what is the evidence before court to prove the alleged contempt? The only evidence before court consists of the two (2) photographs which show some cultivation on the land. However, the photographs are not dated hence it is not possible to determine whether they were taken before or after the issuance of the consent orders of June 24, 2021. The court has further noted that although the photographs depict some cultivation on the ground, there is nothing in the photos to show that it was cultivation of new ground. On the contrary, the pieces of vegetation on the ground seem to suggest that the cultivation was not entirely new since there is indication of what appears to be maize stalks from a previous season. Accordingly, the court is not satisfied that the defendants have proved the contempt alleged against the plaintiff to the required legal standard.

c. Whether the defendants are entitled to the orders sought in the application

14. The court has already found that the defendants have failed to prove the contempt alleged against the land surveyor - Nyahururu. The court has further found that the defendants have failed to prove the contempt of court alleged against the plaintiff. It would, therefore, follow that the defendants are not entitled to the orders sought against the alleged contemnors.

H. Conclusion and disposal

15. The upshot of the foregoing is that the court finds no merit in the defendant's application for contempt of court. Accordingly, the court makes the following orders for disposal of the application:

- (a) The notice of motion dated March 28, 2021 is hereby dismissed with no order as to costs.
- (b) The defendants are hereby directed to expeditiously serve the court orders made on June 24, 2021 upon the county land surveyor – Laikipia county for implementation.
- (c) The county land surveyor – Laikipia shall implement the order on excision of the suit property within 90 days from the date hereof and file a report in court to that effect.
- (d) The matter shall be mentioned on January 18, 2023 do confirm compliance.

Orders accordingly.

RULING DATED AND SIGNED AT NYAHURURU THIS 22ND DAY OF SEPTEMBER, 2022 AND DELIVERED VIA MICROSOFT TEAMS PLATFORM.

In the presence of:

Mr. Gakuhi Chege for the plaintiff

Mr. Oyugi for the Defendants

C/A - Carol

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Y. M. ANGIMA

JUDGE

