



Musa & 6 others v Hassami & 4 others (Environment & Land Case 133 of 2015) [2025] KEELC 144 (KLR) (24 January 2025) (Ruling)

Neutral citation: [2025] KEELC 144 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 133 OF 2015
LL NAIKUNI, J
JANUARY 24, 2025**

BETWEEN

**ALI MOHAMMED MUSA 1ST PLAINTIFF
ALEX MASA GWEDE 2ND PLAINTIFF
GEORGE OKUMU WANYAMA 3RD PLAINTIFF
TUKU KADZAYO TUKU 4TH PLAINTIFF
CHARLES RAMA AMOS 5TH PLAINTIFF
RASHID NASORO GANZORI 6TH PLAINTIFF
MOHAMMED MVOO MUSA 7TH PLAINTIFF**

AND

**MAHMOOD HASSAMI 1ST DEFENDANT
JAFFER KASSAM 2ND DEFENDANT
ESMAIL KASSAM 3RD DEFENDANT
KUSA KASSAM 4TH DEFENDANT
ESSAK KASSAM 5TH DEFENDANT**

RULING

I. Introduction

1. What is before this Honourable Court for its determination is a Notice of Motion application dated 21st August 2024 filed by the 3rd Plaintiff/Applicant under a Certificate of urgency of even date. The Applicant is acting in person. The application was brought under the provision of Section 5 (1) of the



Judicature Act Cap 8, Sections 1A, 1B and 3A of the Civil Procedure Act, Cp. 21 and Order 40 of the Civil Procedure Rules, 2010.

2. As evidenced from the contents of the affidavit of service sworn on 22nd October 2024, on the 11th September 2024 the 3rd Plaintiff personally served the application upon the Law firm of Messrs. Kihiko N & M Advocates on behalf of the Defendants as well as the Law firm of Messrs. Waziri Omollo & Co. Advocates on behalf of the 2nd and 7th Plaintiff. He also served the 2nd Plaintiff at his home on 13th September. Despite the above said service there were neither replies nor submissions elicited by these parties. Thus, the Honourable Court will rely entirely on the application and make a determination on its own merit thereof.

II. The 3rd Plaintiff/Applicant's case

3. The 3rd Plaintiff/Applicant's application sought for the following orders: -
 - a. Spent.
 - b. That the individuals listed herein below be cited for contempt of orders of this Honourable Court issued on the 15th May 2024.
 - c. That the said individuals include:-
 - i. Alex Masa Gwede Of ID 13418594
 - ii. Kahindi Kalume Dzuya Of ID 2247531
 - iii. Juma Zuma Bahaji Of ID 2525849972
 - iv. Santa Lena Kahindi Of ID 33410583
 - v. Maclean Mwatemo Mwadzombo Of ID 13486753
 - vi. Alex Masha Chengo Gogo Of ID 11764196
 - vii. Sawa Omar Mwahozi Of ID 37685246
 - viii. Vitalis Owino Muga Of ID 9399709
 - ix. Abdulhakim Ahmed Bayusuf & Sons
 - d. That a notice to show cause does issue for the above-mentioned contemnors to show cause why they should not be punished for contempt of the court orders issued on 15th May 2024.
 - e. That failure to show cause, the contemnors be committed to civil jail for a term not exceeding 6 months and/or their movable property be attached for disobeying and/or breaching the orders of the court issued on the 15th May 2024.
4. The application is premised on the grounds, testimonial facts and the averments made out under a 15 supporting affidavit sworn on 21st August 2024 by GEORGE OKUMU WANYAMA the 3rd Plaintiff/Applicant herein together with supposedly five (5) annexures marked as "GOW - 1 to 5" annexed hereto. He averred as follows:-
 - a. He was the 3rd Plaintiff/Applicant herein, well conversant with the facts of this case hence competent to swear this affidavit in support of the instant application.



- b. He had the permission and authority of his Co - Plaintiffs to appear, plead and depone to issues related to this matter. Assumably annexed hereto and marked as “GOW - 1” was the Letter of Authority.
- c. Save in so far as is expressly stated herein, the facts deponed to herein, was clearly known to him. In so far as they were not known to him, he had disclosed sources of their information which sources he verily believe to be true and correct.
- d. On the, 15th June 2015, he filed a suit claiming Land adverse possession over the suit property known as L.R NO 819/II/MN situate in Kiembeni, within the County of Mombasa.
- e. The matter had been diligently prosecuted since institution. Subsequently, on the 15th May 2024 the Court granted the interim orders to the effect that the status quo be maintained in the matter, meaning that the situation to remain as it was before the filing of the case.
- f. Further, by the said orders, it meant there would be no construction, invasion and/or dealing on the suit property in any way. That the order was extracted on the 16th May 2024. Assumably annexed hereto and marked as “GOW - 2” was a copy of the said order.
- g. The said order was clear, unambiguous and unequivocal and was served upon all parties to this suit.
- h. Despite being served with the said Order, a group of individuals who were part of the Plaintiffs herein had flagrantly disobeyed the said order by attempting to illegally and forcefully proceeding with constructions and erecting structures on the suit property. Assumably annexed hereto and marked as “GOW - 3” was a bundle of Photographs taken displaying structures recently erected on the suit property by the Defendants.
- i. Further, the said individuals through their authorized agents had and were in the process of selling parts of the suit property to third parties contrary to the court orders issued on 15th May, 2024. Assumably annexed hereto and marked as “GOW - 4” was a copy of an agreement between the said individuals and a 3rd Party evidencing the ongoing illegal sale of parts of the suit property.
- j. The said individuals included:-
 - i. Alex Masa Gwede of ID No. 13418594.
 - ii. Kahindi Kalume Dzuya of ID No. 2247531.
 - iii. Juma Zuma Bahaji of ID No. 25849972.
 - iv. Santa Lena Kahindi of ID No. 33410583.
 - v. Maclean Mwatemo Mwadzombo of ID No. 13486753.
 - vi. Alex Masha Chengo Gogo of ID No. 11764196.
 - vii. Sawa Omar Mwahozi of ID No. 37685246.
 - viii. Vitalis Owino Muga of ID No. 9399709.
 - ix. Abdulhakim Ahmed Bayusuf & sons
- k. The said individuals’ unlawful conduct interfered with the administration of justice to the Plaintiffs’ detriment. Additionally, it violates the dignity, repute and authority of the Court.



- l. The said individuals' contemptuous actions were a breach of the doctrine of lis pendens which prevented interference of any property that was the subject of litigation and that the said individuals' illegal actions had the effect of arbitrarily asserting ownership thereon, before the same was determined, therefore greatly prejudicing the Plaintiffs.
- m. The said Order had never been reviewed, challenged and/or appealed from and were therefore still valid.
- n. It was only fair and in the interest of justice and to protect the integrity of this Honorable Court as well as the rule of law that this application be allowed.
- o. Thus, the said individuals should be punished by committal to civil jail or be ordered to surrender their movable property or in any other way that the Court deemed fit.

III. Analysis and Determination

5. I have carefully perused the filed application by the 3rd Plaintiff/Applicant herein, the relevant provision of *the Constitution* of Kenya, 2010 and the statutes. For the Court to reach an informed, fair and reasonable decision it has crafted the following two (2) issues.
 - a. Whether the Notice of Motion application dated 21st August, 2024 has merit or not?
 - b. Who will bear the costs of the application

ISSUE No. a). Whether the Notice of Motion application dated 21st August, 2024 has merit or not?

6. Before going into the merits of the case, unfortunately, this court has noted that evidentiary documents referred to as "GOW - 3" and "GOW - 4" which can be inferred as the documents showing contempt of this court's order dated 15th May 2024 have not been attached, at least from the one filed through the Court Tracking System (CTS).
7. It is imperative to note that Affidavits are generally governed by the *Oaths and Statutory Declarations Act*, Cap. 15 and Order 19 of the Civil Procedure Rules, 2010. However, they are silent on attachment of documents. Nonetheless, as to whether the lack of attachments makes the affidavit fatally defective, the court refers to the provision of Order 19 Rule 7 which states as follows:

"The court may receive any affidavit sworn for the purpose of being used in any suit notwithstanding any defect by misdescription of the parties or otherwise in the title or other irregularity in the form thereof or on any technicality."
8. Additionally, the court refers to the provision of Order 19 Rule 6 of the Rules on instances when the court can strike out affidavits. From the statements made in the said affidavit dated 21st August 2024, Paragraphs 7 and 8, there seems to be a gross violation of the court orders of 15th May 2024 and those statements are not scandalous, irrelevant or oppressive.
9. However, on the aspect of "the burden of Proof" the rules of evidence specifically the provision of Section 107 (1) of the *Evidence Act*, Cap. 80 states as follows:-

“

- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”



From the face value, the 3rd Plaintiff/Applicant has failed in attaching the documents which would have assisted him in this application. As stated, the burden of proof was on him to attach the said documents.

10. A perusal on what most courts deem as incurably defective affidavits are those affidavits which have not been verified by a commissioner of oaths as can be seen. This position was held in the supreme court of Uganda in the case of “Male Mabrizi – Versus - G.S.C.M.A 7 of 2018 while relying on Kasaala Growers Co-operative Societies – Versus - Kakooza Jonathan & Another Supreme Court Civil Application No. 19 of 2010”. The Court drew a clear distinction between a defective affidavit and the one which does not comply with the law. It stated that a defective affidavit is curable while an affidavit which does not comply with the law is incurable.
11. Similarly, the above legal position is supported by the holding of Ringera J (as he then was) in the case of “Microsoft Corporation – Versus - Mitsumi Computer Garage Limited & Another Nairobi (Milimani) HCCC No. 810 of 2001 [2001] KLR 470; [2001] 2 EA 460, where he stated that:-

“...Rules of procedure are handmaidens and not mistresses of justice and should not be elevated to a fetish as theirs is to facilitate the administration of justice in a fair, orderly and predictable manner, not fetter or choke it and where it is evident that the Plaintiff has attempted to comply with the rule requiring verification of a plaint but he has fallen short of the prescribed standards, it would be to elevate form and procedure to a fetish to strike out the suit. Deviations from or lapses in form or procedure, which do not go to the jurisdiction of the Court or prejudice the adverse party in any fundamental respect, ought not be treated as nullifying the legal instruments thus affected and the Court should rise to its higher calling to do justice by saving the proceedings in issue....”
12. As indicated, from the reasons adduced herein, the application is inadequate and thus defective. To me this defect is curable in the interest of Justice and fair hearing based on the provisions of 25 (c), 50 (1) and (2) and 159 (1) and (2) of *the Constitution* of Kenya, 2010. Thus, it behooves this court to save this application by advising the 3rd Plaintiff/Applicant, he so wishes to file all his attachments in court and serve it on all the parties and the application to be heard on its merit.

Issue No. b). Who will bear the costs of the application

13. There is no prayer for costs and in assuming there was such a prayer it would be premature to give any orders on costs at this juncture.

IV. Conclusion and directions

14. In conclusion, after a careful and sole analysis of the application, guided by the principles of Preponderance of Probabilities and balance of Convenience, the Honourable Court proceeds to make the following orders: -
 - a. That the Supporting affidavit to the Notice of Motion application dated 21st August, 2024 be and is hereby found to be defective arising from the lack of the referred to attachments specified as “GOW – 1”, “GOW – 2”, “GOW – 3” and “GOW – 4” thereof.
 - b. That in order to save the instant application, the 3rd Plaintiff/Applicant to file and serve all the attachments mentioned in (a) above within the next seven (7) days of this ruling.
 - c. That failure to comply with the above order (b), the instant application shall stand and/or deemed as dismissed without further reference to this Honourable Court hereof.



- d. That in the meantime, the Honourable Court reserves the 14th March, 2025 as the date to deliver the Judgement of the main suit herein
- e. That there shall be no orders as to costs

It is so ordered accordingly.

RULING DELIVERED THROUGH THE MICROSOFT TEAMS VIRTUAL MEANS AND SIGNED ON THIS.....24THDAY OF ...JANUARY...2025

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**HON. JUSTICE MR. L.L. NAIKUNI,
ENVIRONMENT & LAND COURT AT
MOMBASA**

Ruling delivered in the presence of:-

- a. M/s. Firdaus Mbula, the Court Assistant.
- b. Mr. Otieno holding brief for Mr. Adhoch Advocate for the 1st, 4th, 5th, & 6th Plaintiffs.
- c. No appearance for the 2nd, 3rd & 7th Plaintiff/Applicant.
- d. No appearance for the Defendants.

