



REPUBLIC OF KENYA



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**Wanderi v Mbiyiwe & 4 others (Environment & Land Case 235 of 2016)
[2022] KEELC 14967 (KLR) (23 November 2022) (Judgment)**

Neutral citation: [2022] KEELC 14967 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND CASE 235 OF 2016
CK NZILI, J
NOVEMBER 23, 2022**

BETWEEN

FRANCIS WANDERI PLAINTIFF

AND

JOSEPH MBIJIWE 1ST DEFENDANT

DAVID MUTUMA MUGAMBI 2ND DEFENDANT

WILBERT OTIENO 3RD DEFENDANT

AGOSTINO LAIBUNI 4TH DEFENDANT

DENIS KINOTI 5TH DEFENDANT

JUDGMENT

1. By a plaint dated 5.6.2016 the plaintiff as the recorded owner and proprietor of land Parcel No 4886 Ruiru/Rwarera Buuri District sued the defendants pursuant to a consent to sue issued by the District Land Adjudication and Settlement Officer on November 10, 2016 for trespass and construction of semi-permanent structures, cultivation and fencing activities on his land. He sought for the orders of eviction and a permanent injunction based on list of witness statements and list of documents attached thereto, further witness statements dated 3.11.2021 and a further list of documents dated 3.11.2021.
2. The defendants filed a defence dated 25.7.2017 and stated that his land was Parcel No 634 Ruiru Rwarera Adjudication Section which he has lived on and developed for 40 years but which the plaintiff was allegedly calling his land. He denied any interference with the alleged plaintiff's land. Following service of the summons upon the 2nd defendant and non-appearance, the plaintiff requested for interlocutory judgment vide request dated 28.7.2017.
3. Meantime, by application dated 16.1.2018 and 13.6.2018 the 1st defendant and the plaintiff sought to join other parties to the suit. An order was also made for a scene visit report which led to the



land surveyors report dated 2.12.2019. The land surveyor made a finding that Parcel No 4886 was a subdivision for Parcel No 709. That from the map and ground, Parcel No 709 did not border Parcel No 634 hence there was no direct relationship in terms of common boundary and or alleged encroachment between the two parcels of land. The land surveyor attached a copy of a sketch map to his report. The defendants eventually filed a list of documents dated 3.11.2021.

4. The plaintiff in his testimony before court adopted his evidence as contained in his witness statement dated 3.11.2021 as his evidence in chief, and produced a copy of the demand letter dated 2.8.2016 as P exh No (1), confirmation letter dated 6.10.2016 as P exh No (2), consent dated November 10, 2016 as P exh No (3), supporting affidavit dated 16.11.2016 as P exh No (4), statement and orders of 3.7.2016, 16.9.2016, December 16, 2016 & 21.7.2017, joint report dated 7.12.2017, area maps District Land Adjudication and Settlement Officer (Dlaso), letter dated 4.3.2019, letter to Andrew Khaemba, report dated 2.12.2019, ruling dated 10.5.2019 and photographs thereto as P Exh No's 5-18 respectively.
5. In cross examination the plaintiff insisted that he only sued the 1st and 2nd defendants only and that the scene visit reports were clear that the 1st defendant had his own separate land and should vacate and or be removed from his land. Further, he told the court that the other defendants were brought to the case by the 1st and 2nd defendants as interested parties and that had no complaint against them.
6. Further PW 1 testified that his claim was against Parcel No 4886 since the 1st defendant land was Parcel No 634 yet he had trespassed into Parcel No 4886. The plaintiff insisted that he had no claim against the deceased seller to his land since neither of his defendants had trespassed into his land.
7. DW 1 Augustino Laiburi adopted his witness statement dated 3.10.2021 as his evidence in chief. He testified that he came to the suit after the 1st defendant was sued so as to protect his interests. He produced sale agreements dated 6.6.2013, 9.12.2015 and 24.3.2014, confirmation letter dated 25.7.2017, letter dated December 17, 2018, plaint in ELC No 28 and 73 of 2000, witness statement of the plaintiff in ELC No 73 of 2000, confirmation letter over Parcel No 4886, surveyors report dated 2.12.2012, letter from Dlaso over parcels No's 634 & 675 and photographs as D Exh No's 1-13 respectively.
8. The defendant said that D exh No 6 showed the name of the alleged trespasser and included his name alongside the other defendants hence the reason he had joined the suit. He said that the surveyors report produced as D Exh No 10 was after they had engaged the marker but it was slightly different from the 1st scene visit report. He confirmed that the plaintiff did not sue him directly and that he only came into the matter after the application dated 26.1.2018 from which he filed a defense with no counterclaim against the plaintiff. He said his defense was that the deceased had sold everything to them.
9. DW 1 further, told the court he was occupying his land and did not know where the plaintiff's land was situated. He admitted that the plaintiff had pleaded no trespass particulars against him. DW 2 adopted his witness statement dated 3.11.2021 as his evidence in chief and confirmed that he was occupying his own land which the plaintiff had not interfered with. He said he was never sued by the plaintiff nor did he have a claim against him though he had incurred costs since 2016. Additionally DW 2 said the surveyors report dated 3.2.2020 had confirmed the locality of the two parcels of land as distinct with his Parcel No 705 bordering his Parcel No 695. He urged the court to grant him costs.
10. The plaintiff submitted that the 1st defendant passed on 21.3.2021 but was not substituted to which he abandoned any claims against him. Further the plaintiff submitted that since he did not bring on board the interested parties all what he sought were costs for the time and expenses occasioned by the interested parties who in their testimonies have confirmed that they were never sued by the plaintiff nor did they file any counterclaim against him.



11. The plaintiff urged the court to make a finding based on the testimony and the land surveyors report there was no nexus between the suit land and the interested parties who only brought themselves to the court to occasion unnecessary expenses and derail the matter.
12. The plaintiff submitted that the interested parties complicated an otherwise straight forward case, delayed the matter and instead of conceding to the scene visits, refused to cooperate leading the plaintiff to incur b expenses over the aborted scene visits despite the entry of judgment against the 2nd defendant.
13. The interested parties submitted that the 3rd – 4th and 5th defendants applied to be included in the suit as interested parties but the court made them defendants who have participated in the suit. They however concede that the plaintiff admitted that he had no claim against them only after the claim against the 1st defendant aborted.
14. Given the foregoing the 3rd, 4th & 5th defendants submitted that the only question left for the court’s determination was whether the plaintiff has proved his claim and the issue of costs.
15. On issue number 1, it was submitted that the plaintiff had failed to prove his claim on encroachment or eviction and that turning around a few months to the hearing to say that he had no claims against them was an abuse of the court process and a waste of court’s time.
16. Further, it was submitted that if the plaintiff knew that he had no claim against the 3rd, 4th and 5th defendants he should not have allowed their inclusion to the suit.
17. Concerning the costs, the 3rd, 4th and 5th defendants submitted costs follow the events under section 27 of the *Civil Procedure Act* but the court guided by Kuloba, J in *Judicial Hints on Civil Procedure* should divert from the general rule and order that each party to meet their own costs.
18. Reliance was placed on *Jabir Singh Rai & others v Tarlochan Rai & others* [2018] eKLR & *Morgan Air Cargo Ltd v Everest Enterprises Ltd* [2014] eKLR. Further, it was submitted that given the plaintiff has not succeeded in his claim, the court found good reason for the 3rd, 4th & 5th defendant to join the suit, the plaintiff failed to amend the plaint so as to enable the defendants to amend their defence and lastly that following the abatement of the case against the 1st defendant, the most prudent thing for the plaintiff was to withdraw the suit or apply to have them removed but instead testified before court.
19. The 3rd, 4th & 5th defendants submitted that they had every reason to defend their interests in the 1st defendant parcel of land and since they have participated in the case they deserved and award of costs, more so since the conduct of the plaintiff and his advocates was wanting. Reliance was placed on *DGM v Ewa* [2021] eKLR.
20. The issues falling for court’s determination are:
 - i. If the plaintiff has proved his case against the 2nd defendant.
 - ii. If the plaintiff is entitled to costs from the 3rd, 4th and 5th defendants.
 - iii. If the 3rd, 4th & 5th defendants are entitled to costs from the plaintiff notwithstanding that they filed no claims against him.
 - iv. What are the appropriate orders.
21. The plaintiff’s claim was against the 1st and 2nd defendants over Parcel No 4886 based on alleged trespass. Alongside the plaint, the plaintiff brought an application for temporary orders which the court granted through a ruling delivered in 2016 pending hearing and determination of the suit.



22. The 1st defendant entered appearance on 10.7.2017 and filed a defence dated 25.7.2017 and averred that his land was Parcel No 634 which the plaintiff had claimed to be his. The plaintiff sought for and obtained an interlocutory judgment against the 2nd defendant for eviction and for permanent injunction. The court following an application dated 18.7.2017 ordered that the Dlaso Meru Central visits the two parcels of land, point out the same on the ground and for a report to be filed in court. Interim orders were also extended on 31.7.2017.
23. By an application dated 16.1.2018 Augustino Laibuni through the 1st defendant's counsel on record, the 3rd defendant sought to be joined to the suit alongside 4th & 5th defendants based on purchase of land from the 1st defendant. He alleged that any eviction against the 1st defendant was likely to affect the proposed parties. The sale agreements attached to his application were relating to Parcel No 634 and not Parcel No 4886. The court allowed the application on 17.1.2018.
24. Following the scene visit, the Dlaso tendered a report dated 7.12.2017 vide a letter dated 17.1.2018 and confirmed that using Preliminary Index Diagram (PD) the established position on where the owner of Parcel No 634 occupied a completely different position from where he ought to be and was actually partly occupying the position of Parcel No 4886 and the whole Parcel No 675 which parcel as occupied was not adjacent to Parcel No 634 as per the available record in possession of the office of Dlaso. Similarly, the Dlaso said that he pointed out the correct position to the owners in the presence of the area chief.
25. The firm of J Nelima and Associates on behalf of the defendants filed a preliminary objection dated 16.7.2018 urging the plaintiff suit be struck out with costs since the land fell under an adjudication section.
26. The court on 17.1.2018 allowed the 3rd, 4th and 5th defendants to join the suit with liberty for the plaintiff to file and serve a reply to defence and a revisit of the scene in the presence private surveyors. An order to that effect was extracted dated 16.9.2019.
27. A scene visit took place as per the letter dated 2.12.2019 which the land surveyor and Dlaso, but they failed to submit a report and communicated by a letter dated 6.2.2020 that the defendants were adamant to participate in the exercise. Summons were eventually issued for their attendance on 7.2.2020 for 17.2.2020. Counsel for the defendants wrote a letter dated 24.9.2020 disputing any alleged scene visit for 20.2.2022. The court issued fresh summons to the Dlaso and County surveyor to show cause for 9.11.2021. The said officers filed their report dated 3.2.2022 attaching the registry index map which clearly showed that the two parcels of land did not boarder each other.
28. With the above context in mind, the plaintiff testified that he had proved his case against the 2nd defendant to the required standards and since the suit against the 1st defendant abated, or was also abandoned, he should be awarded costs. Further, he submitted that he had no claim against the 3rd, 4th and 5th defendants and given their late entry, delay and conduct they should meet the costs of the suit. On the other hand, the defendants suggested that since the plaintiff did not object to their joinder and or withdraw the suit against them even after the 1st defendant passed on, they should be awarded costs.
29. It is trite law parties are bound by pleadings and issues flow from pleadings. The 3rd, 4th and 5th defendants were formally joined in the suit vide the order issued on 17.1.2018. They never filed any pleadings except a preliminary objection dated 16.7.2018 attacking the claim on account of jurisdiction.



30. The 3rd, 4th and 5th defendants opted to join the sue without the prompting of the plaintiff. They also knew as at that date of coming to court that the scene visit report had indicated that the two parcels of land were totally on different localities and confirmed that the plaintiffs land was mistakenly occupied.
 31. Despite that clear knowledge and the consent to use dated November 10, 2016, the 3rd, 4th and 5th defendants filed a preliminary objection to the suit.
 32. The said three defendants kept on postponing the suit issuing threats for the revisit of the scene which had initially been requested at their behest. To date the plaintiff, 3rd, 4th and 5th defendants have not produced a rival report. Exh No 1, 2, 3 & 4 relate to Parcel No 634 and not Parcel No 4886. D Exh No 6 relate to Parcel No's 675 & 634. D Exh No 8 has no relationship with the plaintiff. D Exh No 10 states that the two parcels of land have no relationship in terms of bordering and encroachment. D Exh No 11 has no relevance to this suit.
 33. To my mind therefore, the 3rd, 4th & 5th defendants rely solely on a preliminary objection which they have not substantiated by way of evidence. Similarly, once the 1st defendant passed on, the 3rd, 4th & 5th defendants did not seek to follow up and join the estate of the deceased, 1st defendant if at all they had any interests to guard relating to Parcel No. 634, which was their sole ground in seeking to join the suit that if the prayers sought by the plaintiff over Parcel No4886, were issued they would adversely be effected as beneficial owners of Parcel No 634 pursuant to a purchaser's interest.
 34. My finding therefore is the plaintiff has proved the case against the 2nd defendant to the required standard and is entitled to the prayers sought. As to the Preliminary objection dated 16.7.2018 on behalf of 3rd, 4th and 5th defendants, the same is dismissed with costs for lack of evidence and nexus with the plaintiff's claim.
 35. The law is that costs follow the events as per *Jasbir* (*supra*). The plaintiff has succeeded in his claim against the 2nd defendant for the prayer sought in the amended plaint and against the 3rd, 4th and 5th defendant on account of the preliminary objection. Therefore, he is entitled to costs of the suit.
 36. Counsel for the 3rd - 5th defendants urged the court to divert from the general rule since the conduct of both the plaintiff and his advocates on record was wanting for not only allowing their joinder to the suit but also failing to withdraw it after the demise of the 1st defendant and causing them to attend an unnecessary hearing.
 37. A party is at liberty to join proceedings but must also know it may be liable to costs if its participation in the suit is found to be unnecessary, an obstruction to justice, not in good faith and with a sinister motive and in abuse of court process. See *Twiga Estate Squatters Society v Municipal Council of Ruiru & 8 others* [2018] eKLR.
 38. The 3rd - 5th defendants came to this suit voluntarily and failed to file a defense save for the preliminary objection which they did not substantiate. They delayed the matter and failed to follow up any interest against the 1st defendant.
 39. The plaintiff had no obligation to withdraw the claim which he never filed against the 3-5th defendants. They must now bear the consequences of the dismissal of the preliminary objection.
 40. Therefore, I find that there are no good grounds for the court to divert from the general rule as per the caselaw of *Jasbir*.
- Orders accordingly.



DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT THIS 23RD DAY OF NOVEMBER, 2022.

In presence of:

C/A: Zamzam

No appearance

HON CK NZILI

ELC JUDGE

