Tapoyo v Tapoyo & another (Environment & Land Case 36 (E032) of 2021) [2025] KEELC 288 (KLR) (4 February 2025) (Ruling)

Neutral citation: [2025] KEELC 288 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ENVIRONMENT & LAND CASE 36 (E032) OF 2021

FO NYAGAKA, J

FEBRUARY 4, 2025

BETWEEN

JAMES MUSA TAPOYO ..... PLAINTIFF

AND

SAMSON TAPOYO ..... 1ST DEFENDANT

FREDRICK PKEMOI ANDIEMA ..... 2ND DEFENDANT

RULING

1. The Plaintiff moved this Court through an Application dated 5/4/2024. He brought it under Sections 5(1) of the *Judicature Act*, Sections 1A, 1B and 3B of the *Civil Procedure Act* and Order 51 of the *Civil Procedure Rules* 2010 and all enabling provisions of the law. He sought the following orders:-

    1. ...spent
    2. ...spent
    3. That this Honorable Court be pleased to commit the 2nd Respondent to civil jail pending the hearing and determination of the main suit.
    4. The Honorable Court be pleased to grant any orders it deems fit to grant.
    5. That the costs of this application be provided for.

2. The application was based on eight (8) grounds. The first one was that the 2nd Respondent was a serial contemnor whose conduct tremendously dragged the hearing of the main suit. The ruling of this court made on 30/3/2022 found their content mobility of the offense of contempt of Court and he was sentenced to a fine of Kenyan Shillings 70,000/= and in default, he was to serve one month in prison. He was also directed to demolish the structure he had constructed on the land. He demolished it and paid the fine of Kshs. 70,000/=. But when he was released from prison, he resumed his “utado” (sic)

attitude. He again intentionally defied the court orders. This prompted the applicant to file another application dated 6/7/2022 for punishment for contempt of court. By a ruling dated 16/11/2022, this Court found again the 2nd Respondent guilty of contempt of court. It convicted and sentenced him to imprisonment for three months. Notwithstanding, he was intent on dragging the hearing of the main suit because he kept causing the court to deal with applications for contempt of court. He was hell-bent on stalling the hearing and determination of the main suit.

3. On 13/2/2024, some progress was made towards the hearing. The matter was adjourned to 10/4/2024 for further hearing. However, the said Respondent was determined to halt the proceedings. It was in the interest of the rule of law that the orders sought to be granted.

4. The application was supported by the Affidavit of the Applicant, James Musa Tapoyo, sworn on 5/4/2024. His deposition repeated the contents of the grounds in support of the application. He, however, added that on 30/3/2024, the 2nd Respondent once again trespassed on the suit land. He uprooted the fence posts to create access for the tractor. He annexed and marked JMT3 (a), (b) and (c) photographs dated 30/3/2024. Further, he annexed and marked JMT 1 (a), (b), (c), and (d) the orders dated 20/7/2021, 25/1/2022, and the Rulings dated 3/3/2022 and the 16/11/2022. Further, he annexed as JMT -2(a), (b), (c) and (d) the Occurrence Book Numbers OB No. 20/13/03/20/24, OB No. 14/30/03/2024 and photographs dated 13/3/2024 respectively.

5. The applicant added that on 1/4/2024 the 2nd Respondent drove a tractor onto the suit parcel of land and ploughed it with the intention of planting crops. He attached and marked JMT4 (a) and (b) photographs of this action. He added that unless the 2nd Respondent was restrained by the court, he (the applicant) would suffer irreparable damage if the 2nd Respondent continued to disobey court orders. Further, the applicant had been religiously attending court but the 2nd respondent was hell bent on stalling and halting the hearing of the matter. Further, the 2nd Respondent was determined to ensure that the matter would never be concluded as he continuously kept the court busy hearing applications for contempt of court.

6. The Applicant added a Supplementary Affidavit sworn on 29/4/2024. He stated that on 16/4/2024, the Respondent and the officer in charge of Kapenguria Police Station were served with the directions of the court dated 15/4/2024. He marked JMT1 a copy of the directions. He added that despite the service, the 2nd Respondent continued to trespass onto the land, yet the officer in charge of Kapenguria Police Station, who had been informed of these actions, never took any step. On 18/4/2024, the applicant filed a report at Kapenguria Police Station about the 2nd Defendant's unlawful and criminal acts, but the OCS Kapenguria directed the applicant to go and report at Makutano Police Post, which he did. But the officer in charge of the Police Post only served the second respondent with a requisition to compel him to attend instead of arresting him. He marked JMT 2 a copy of the said requisition to compel attendance. The 2nd defendant, upon being served the requisition to compel attendance did not honor it. On 22/4/2024 the 2nd Defendant planted the maize crop on the land in violation of the court orders.

7. The respondent did not file any response to the application. Rather, at the inter-parties hearing, he insisted that the court direct that the County Surveyor be sent to demarcate the land and erect beacons on it to separate the disputed parcels of land.

8. On his part the applicant submitted through written submissions dated 3/5/2024. The Respondent did not submit save that he prayed that the Court orders a survey to be conducted on the disputed parcels of land to ascertain their extent and boundaries so that the parties be shown their respective portions and they live in peace.

Issue, Analysis and Determination

9. I have considered the application, the law and submissions by the applicant since he was the only one who made submissions on the application. In any event, submissions do not constitute parties' submissions as was held by the Court of Appeal in *Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another* [2014] eKLR where it stated:

> " Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties' "marketing language", each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed, there are many cases decided without hearing submissions but based only on evidence presented."

10. Similarly, the fact that a party does not oppose an application or file pleadings in response to a claim or allegation by an adverse party does not remove or lift the burden of proof the Plaintiff, claimant or applicant as required by law, specifically, Section 107 of the *Evidence Act*. This is because he who alleges a fact must prove it unless the law specifically places the burden of doing so on another person other than him. Rather, it obliges the court to carefully consider whether by the end of the day the party alleging it proved it to the required standard, which, in civil cases, is on a balance of probabilities. This is what this Court proceeds to do in the instant application.

11. Thus, having said that, only two issues lie before me for determination in the application. The first one is whether the application is merited. The second one is who to bear the costs of the application.

12. At the outset it is important for the Court to point out that whereas it is under duty to consider and determine disputes or substance rather than technicalities or procedure unless these go to the root of the dispute, some of the mistakes or shortcomings are so fundamental that they go to the root of the dispute. Not even the application of Article 159(2)(d) of the *Constitution* of Kenya can salvage them. This is particularly so such errors constitute what this court may call the systemic composition of the skeleton on which the dispute is built, which is the pleadings.

13. It is worth saying further that parties are bound by their pleadings. Courts will not trudge, whether by craft or ingenuity beyond the parties' pleadings. In *Ogando v Watu Credit Limited & Another* (Civil Suit E098 of 2022) [2024] KEHC 3074 (KLR) (14 March 2024) (Judgment),

> " ...since the pleading is a basis upon which the claim is found, it is settled law that, parties are bound by their own pleadings and that any evidence produced by any of the parties which is not supportive or is at variance with what is stated in the pleadings must be ignored."

14. Further, the Court, in *Independent Electoral and Boundaries Commission & Another v Stephen Mutinda Mule & 3 Others* [2014] eKLR cited the Malawi Supreme Court of Appeal in *Malawi Railways Ltd Vs. Nyasulu* [1998] MWSC 3, in which the learned judges quoted with approval from an article by Sir Jack Jacob entitled "*The Present Importance of Pleadings*." [1960] Current Legal problems, at P174. The author states;

> " As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings...for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot

be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice....

In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called "Any Other Business" in the sense that points other than those specific may be raised without notice."

15. Again, in *Salim Said Mtomekela v Mohamed Abdallah Mohamed*, Dar-Es-Salaam Court of Appeal Civil Appeal No. 149 of 2019 (Mugasha. JA Kihwelq. JA Rumanyika. JA p) held: -

> " Pleading in law means, written presentation by a litigant in a law suit setting forth the facts upon which he/she claims legal relief or challenges the claims of his opponent. It includes claims and counterclaim but not the evidence by which the litigant intends to prove his case. That said, since the pleading is a basis upon which the claim is found, it is settled law that, parties are bound by their own pleadings and that any evidence produced by any of the parties which is not supportive or is at variance with what is stated in the pleadings must be ignored."

16. This turns me to the payers sought in the instant application, as part of the applicant's pleadings. The main prayer the Applicant made in the application was that, "this honorable court be pleased to commit the 2nd Respondent to civil jail pending the hearing and determination of the main suit." This presupposes that this Court is to commit the Respondent to civil jail, which process and act is the product of an adjudication to the effect that the party being committed to jail owes another a debt he is, by the decree of the court, requires to pay but he fails to. It simply is imprisonment over debt.

17. Whereas the facts in this case point to an allegation that the Respondent disobeyed the Court orders by pulling down a fence, driving a tractor through the disputed land and cultivating crops thereon, which facts in the course of the hearing of the application the Respondent admitted, and which acts he ceased to carry out as the application progressed, the prayers sought in the application are diametrically diverse from the prayers that would have been based on the facts. Therefore, as much as the applicant may have had a good complaint against the Respondent, the pleadings failed him miserably. Needless to say, the Respondent implored the court that it directs a survey to be carried out on the land for him to ascertain the extent to which his land gets so that he and the applicant avoid future constant push and pull over the disputed parcels.

18. In the instant application, the facts relied on do not support the existence of a final finding of the court that the Respondent owes the applicant any money. Further, there is no claim that the applicant demanded a sum of money arising from a determination of a dispute herein and the Respondent failed to honor it. Indeed, and on the contrary, the content of the grounds or in support of the application, together with a supporting affidavit imports an idea or contains allegations that the Respondent had committed acts of contempt of Court. Thus, they cannot support the prayers sought in the instant application. The pleadings are totally at variance with what the Court can grant in the circumstances of the allegations of contempt of court that the Respondent disobeyed its orders. This court cannot

redraft the prayers for the applicant to alight itself what it imagines or thinks the prayers could have achieved. In the circumstances, the application is not merited. It is dismissed with costs to the Respondent.

19. Further, and in the interest of justice this Court orders that a survey on the respective disputed parcels of land be conducted to establish the boundaries thereof and occupations so that it be clarified as to who of the parties may or may not be encroaching the other's parcel. This matter be mentioned virtually on 18/2/2025 and the parties, that is to say, the Applicant and the Respondent to attend the Court for directions regarding the survey exercise, as the court may direct.

20. It is so ordered.

RULING DATED, SIGNED AND DELIVERED VIA ELECTRONIC MAIL (E-MAIL) THIS 4TH DAY OF FEBRUARY 2025.

HON. DR. IUR NYAGAKA,

JUDGE