



Dumbeiya v Okoth & 2 others; Obiero & 3 others (Proposed Interested Parties) (Environment & Land Case 54 of 2020) [2023] KEELC 782 (KLR) (8 February 2023) (Ruling)

Neutral citation: [2023] KEELC 782 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE 54 OF 2020
A NYUKURI, J
FEBRUARY 8, 2023**

BETWEEN

NELSON MUTURI DUMBEIYA PLAINTIFF

AND

KEVIN OKOTH 1ST DEFENDANT

COUNTY GOVERNMENT OF MACHAKOS 2ND DEFENDANT

**ALL OTHER UNKNOWN PERSONS CONSTRUCTING OR LAYING CLAIM
TO L.R NO 18990, IR NO 127415 SABAHI ESTATE, MACHAKOS
COUNTY 3RD DEFENDANT**

AND

MICHAEL OCHIENG OBIERO PROPOSED INTERESTED PARTY

SAADI ALI ALIO PROPOSED INTERESTED PARTY

DAVID MUTEMA PROPOSED INTERESTED PARTY

ADAN HALAKE BORU PROPOSED INTERESTED PARTY

RULING

Introduction

1. Before court are two applications. The application dated 3rd August, 2020 filed by the 1st to 4th Proposed Interested Parties and the application dated 24th September, 2021 filed by the Plaintiff. I must point out the application dated 3rd August 2020 was filed by four people namely Michael Ochieng Obiero, Saadi Ali Alio, David Mutema and Adan Halake Boru, but who referred to themselves at the 1st, 2nd and 3rd Proposed Interested Parties. The title of the Application shows that the 3rd Interested Party referred to David Mutema and Adan Halake Boru. Since the two are distinct individuals, to avoid confusion



and for the sake of order, I will refer to the four persons as the 1st, 2nd, 3rd and 4th Proposed Interested Parties respectively.

The First Application

2. The Notice of Motion dated 3rd August, 2020 and filed by the 1st to 4th Proposed Interested Parties sought the following orders;
 - a) Spent.
 - b) This Honourable court be pleased to enjoin the 1st, 2nd and 3rd proposed Interested Parties to the suit herein.
 - c) Pending the hearing and determination of this application, this Honourable Court be pleased to grant an order of stay of execution of the court order issued on the 29th July, 2020 and/or any other consequential orders.
 - d) Pending the hearing and determination of this application, this Honourable Court be pleased to issue an order directing the office of the Directorate of Survey and the Registrar of Lands to visit the suit property and to file its report in court on the following;
 - a) The physical location of LR No. 18990,
 - b) The physical location of LR No. 20433, LR No. 20434 and LR No. 20153 respectively,
 - c) Whether LR No. 18990 is the same as or different from our respective parcels of land being LR No. 20433, LR No. 20434 and LR No. 20153,
 - e) This Honourable Court be pleased to set aside the court order issued on the 29th July, 2020 and or any other consequential orders.
 - f) Costs of this application be provided for.
 - g) Such further order/or other orders be made as the court may deem fit and expedient.
3. The Application is anchored on the affidavit of Michael Ochieng Obiero, the 1st Proposed Interested Party sworn on 3rd August 2020. The Applicants' case is that they are allottees of LR No. 20433, LR No. 20434 and LR No. 20143 respectively while LR No. 20153 belongs to the 3rd and 4th Proposed Interested Parties. Further that the Plaintiff obtained an ex parte order directing the Defendants to remove illegal structures on the Plaintiff's parcel LR No. 18990, LR No. 127415 pending hearing of the suit; and that the Plaintiff is using the said orders with intend to demolish the Proposed Interested Parties properties erected on the suit property.
4. The Applicants further averred that the orders for demolition of their properties ought to be stayed and that they be joined to this suit and a report be filed by the Land Registrar and Director of Surveys on the physical location of LR No. 18990 and LR No. 20433, LR No. 20434 and LR No. 20143.
5. No response was filed in respect of the application.

The Second Application

6. The Notice of Motion dated 24th September, 2021 was filed by the Plaintiff and the same seeks the following orders;



- a) That the application herein be certified as extremely urgent and service of the application be dispensed with in the first instance.
 - b) That pending the hearing and determination of the application herein the order issued on 24th March 2021 by Justice O. Angote in the terms that neither the Plaintiff nor the Defendants and the Interested Parties shall develop, alienate, trespass or encroach on land know as LR No. 18990 I. R. No. 127415 Sabaki Estate Machakos and the order confirmed permanently on 14th April 2021 be served and enforced by the OCS, Athi River Police Station or his authorized subordinates in order to ensure compliance and in order to keep the peace.
 - c) That in the first instance leave if necessary be granted to the Plaintiff herein to commence contempt of court proceedings against the 1st Defendant and the Interested Parties herein.
 - d) That the 1st Defendant herein and the Interested Parties be committed to jail for contempt of the court order issued on 14th March 2021 and permanently confirmed on 14th April 2021.
 - e) That in exercise of the court's inherent powers and to protect the dignity and sanctity of the court process, the court be pleased to vacate Justice C. G. Mbogo's order of stay of execution issued on 4th August 2020 staying the execution of Justice O. Angote's order issued on 29th July 2020.
 - f) That Justice O. Angote having directed the Interested Parties to file a surveyor's report on the exact location of LR No. 18990 I.R. 127415 in order to dispel the Plaintiff's claim to the location of LR No. 18990 I.R. 127415 on the application of the Interested Parties, and the Interested Parties having failed to avail any such report so as to enable the Plaintiff counter it if necessary, and the Interested Parties having not filed any pleadings in this matter or a counter suit, and further the Interested Parties being beneficiaries of an equitable relief of stay of execution of a demolition order while contemptuously disregarding an order restraining parties from developing, alienating, trespassing upon or encroaching upon the suit property and finally the Interested Parties and the Defendant not having submitted before this Honourable Court any approved building plans to enable the Interested Parties to carry out the ongoing construction works, this court in exercise of its overriding objectives be pleased to reinstate the demolition order issued on 29th July 2020 upon varied terms that the Plaintiff do forthwith and unconditionally demolish all the structures erected on the suit property under the supervision of the OCS, Athi River Police Station to provide security to keep the peace during the demolition exercise.
7. The application is supported by the affidavit sworn by the Plaintiff. The Applicant's case is that the order issued on 24th March 2021 was served on the proposed Interested Parties advocates yet the Proposed Interested Parties have defied the said orders. According to the Applicant, the order staying demolition was for 45 days and since it was granted on 4th August, 2020 the 45 days lapsed on 18th September, 2020 and the same have never been extended. That despite this position, the Plaintiff has never moved to demolish the structures on the suit property.
 8. The Applicant further averred that the Proposed Interested Parties had been in contempt of court. Further that on 15th October 2020 the court ordered the Proposed Interested Parties to appoint their own licensed surveyor to prepare and file reports in respect of the suit property. He also stated that the reasons for the Proposed Interested Parties quest to be joined to this suit was merely to obtain stay.
 9. In response to the application, the 1st and 2nd Proposed Interested Parties filed a replying affidavit dated 8th November, 2021. It was their case that they were owners of LR No. 2433 and LR No. 20434



respectively. Further that they were aware of the orders of status quo issued by the court until 14th April 2021 when the application was to be heard. They stated that the court ordered both parties to obtain survey reports. According to them, having obtained a surveyor's report done by Covenant Geo-Survey Systems, LR No. 18990 does not exist in the same locality as the Interested Parties parcels.

10. The 1st and 2nd Proposed Interested Parties held the view that the disobedience of the court order was not on land known as LR no. 18990 a fact established by the surveyor's report. They insisted that the surveyors report showed that their parcels of land are not within the same locality as LR No. 18990. According to them, they have not constructed on LR No. 18990 and that there were squatters on the land.
11. The 3rd and 4th Proposed Interested Parties filed a replying affidavit sworn on 8th November, 2021. Their case was that they co-owned LR No. 20153. They reiterated word for word the contents of the 1st and 2nd Proposed Interested Parties Replying affidavit referred to herein above.

Submissions

12. The 1st, 2nd and 3rd and 4th Proposed Interested Parties filed submissions on 15th December 2021 which the court has considered.

Analysis and Determination

13. Having considered the two applications, the response to the 2nd application and the Proposed Interested Parties submissions, it is my view that the issues that arise for determination are as follows:-
 - a) Whether the 1st to 4th proposed Interested Parties have met the threshold for joinder to this suit.
 - b) Whether the orders of 29th July, 2020 ought to be set aside
 - c) Whether the prayers requiring the Director of Surveys and the Land Registrar to visit the suit property to prepare a report on its locality are justified.
 - d) Whether the 1st Defendant and the 1st to 4th proposed Interested Parties are in contempt of the orders of 14th April, 2021.
14. Order 1 rule 10(2) of the [*Civil Procedure Rules*](#) provides for the test for joinder of a party to a suit as follows;

The court may at any stage of the proceedings either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as Plaintiff or Defendant, be struck out, and that the name of any person who ought to have been joined, whether as Plaintiff or Defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.

15. Therefore, where the presence of any person before court is necessary to enable the court completely and effectually adjudicate on all the issues in the suit, the court may add such party to the suit as an Interested Party.
16. The [*Black's Law Dictionary*](#), 11th Edition defines an Interested Party as a party who has a recognizable stake (and therefore standing) in a matter.



17. In the case of *Communication Commission of Kenya & 4 Others v Royal Media Services Limited & 7 Others* [2014] eKLR, at paragraph 22, the Supreme Court held as follows;

In determining whether the Applicant should be admitted into these proceedings as an Interested Party, we are guided by this court's ruling in the *Mumo Matemo case* where the court (at paragraph 14 and 18) held;

An Interested Party is one who has a stake in the proceedings though he or she was not party to the cause ab initio.

He or she is one who will be affected by the decision of the court when it is made, either way, such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause...

18. Therefore, for a court to join an Applicant to a suit they must show that they have an identifiable stake in the proceedings and that either way, they will be affected by the decision that will be made in the suit.
19. In the instant matter, the 1st to 4th Proposed Interested Parties alleges that they are allottees of Plot Numbers LR 20152, 20434, and 20433 and that the Plaintiff obtained orders against the Defendant for demolition of the Defendants' properties on the Proposed Interested Parties parcels aforesaid. They attached copies of the allotment letters. Having considered the same it appears that the Proposed Interested Parties have an alleged interest/claim on the land in issue. Therefore it is my view that they will be affected by the orders issued in this suit ultimately. I therefore find and hold that the Interested Parties have met their threshold for joinder and that prayer is allowed.
20. On whether the orders of 29th July 2020 ought to be set aside, I observe that on 29th July 2020, what was before court was the application dated 15th July 2020 filed by the Plaintiff which sought for a temporally injunction to restrain the Defendant from encroaching, occupying, demarcating, alienating or constructing on LR No. 18990 LR 12745 Sabaki Estate, Machakos and an order of a mandatory injunction directing the Defendants to demolish all the illegal structures on the said property. The record shows that on 29th July 2020, this court allowed the application dated 15th July 2020 as prayed pending hearing of the suit.
21. On 4th August, 2020, this court stayed the orders granted on 29th July, 2020 for 45 days. Those stay orders were extended on 17th August 2020. On 15th October 2020, the court granted the parties an order to appoint their own surveyors to prepare a report on the locality of LR No. 18990.
22. On 24th March 2021, the court was presented with an application filed under certificate of urgency dated 16th March 2021. The Court subsequently granted orders of status quo until 14th April 2021 when the application was to be heard interpartes. The terms of the status quo were that neither the Plaintiffs nor the Defendants and the Interested Parties shall develop, alienate, trespass or encroach on the land known as LR No. 18990 IR No. 127415, Sabaki Estate, Machakos until 14th April 2021. On 14th April 2021, this court ordered that the orders made on 24th March 2021 to remain in force until the hearing and determination of the suit.
23. Therefore the orders of 14th April 2021 effectively set aside the orders of injunction confirmed on 29th July 2020, so that none of the parties was to develop, alienate, trespass or encroach on the land in dispute. Therefore the orders of 29th July, 2020 are no longer in force and hence cannot be set aside.
24. On whether there is justification for the prayers to have the Director of Survey and the Land Registrar to visit the suit property to ascertain its locality, I note that the only document that the proposed



Interested Parties have filed to show any purported interest in the suit property are letters of allotment. They have not filed any evidence to show that the land described in their allotment letters has ever been surveyed.

25. At the time the Interested Parties allege to have been issued with the allotment letters, the law in force governing allocation of unalienated Government land was the Government Lands Act (repealed). Under that Act, the process of allocation of Government land was elaborate. It started with the preparation of a Part Development Plan (PDP), which is sketch map of the land to be allocated. The PDP was then approved by the Commissioner of Lands or the Minister of Lands. The PDP had a specific number. Thereafter, a letter of allotment based on the approved PDP was issued to the allottee. It was only upon issuance of the allotment letter and compliance with the terms thereof that a Cadastral Survey was conducted for purposes of the issuance of a certificate of lease. The survey must be authenticated and approved by the Director of Surveys before a land reference number is issued in respect of the allotted plot. The above steps were confirmed as the steps to be followed in allocation of unalienated Government land in the cases of *Ali Mohamed Dagane (Granted Power of Attorney by Abdullabi Muhumed Dagane, suing on behalf of the estate of Mohamed Hadi Dagane) v Hakar Bashir & 3 Others*, Garissa ELC Case No. 65 of 2017, and *Nelson Kazungu Chai & 9 Others v Pwani University College* [2014] eKLR.
26. It is therefore clear that the allottee ought to comply with the terms of the allotment letter to pave way for Cadastral Survey. The Proposed Interested Parties have not demonstrated that there was Cadastral Survey in relation to the letters of allotment held by them and therefore the Director of Surveys can only visit the suit property on the strength of the allotment letters where it is shown that survey was done after the issuance of the allotment letter. In the premises, in the absence of evidence of survey on relation to the allotment letters held by the Interested Parties, there is no justification to grant the orders sought. I therefore decline to direct the Director of Surveys and the Land Registrar to visit the suit property for purposes of ascertaining the location of the said property in the terms sought by the Interested Parties.
27. The last issue is whether the four Interested Parties are in contempt of the orders of this court made on 14th April, 2021. The *Black's Law Dictionary*, 11th Edition, defines contempt as follows;
- The act or state of despising. The quality, state or condition of being despised. Conduct that defies the authority or dignity of a court or legislature. Because such conduct interferes with the administration of justice, it is punishable usually by fine or imprisonment.
28. Essentially, contempt of court is an act of defying the court's authority and dignity. This interferes with the administration of justice. Section 5 of the *Judicature Act* vests jurisdiction in the Superior Courts to punish for contempt. Courts punish proven contemnors for purposes of upholding the dignity and authority of the court and to ensure that the rule of law is upheld so as to maintain public confidence in the role of the courts in the administration justice.
29. In the case of *Econet Wireless Kenya Ltd v Minister for Information & Communication of Kenya & Another* [2005] KLR 828 the court stated the importance of obeying court orders as follows;
- It is essential for the maintenance of the rule of law and order that the authority and the dignity of our courts are upheld at all times. The court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proven contemnors. It is the plain and unqualified obligation of every person against whom an order is made by a court of competent jurisdiction to obey it unless and until the order



is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by the order believes it to be irregular or void.

30. Similarly in the case of *T.N. Gadavarman Thiru Mulpad v Ashok Khot & Another* [2006] 5 SCC, the Supreme Court of India weighed in on the risks of disobeying court orders as follows;

Disobedience of this court's order strikes at the very root of the rule of law on which the judicial system rests. The rule of law is the foundation of a democratic Society. Judiciary is the guardian of the rule of law. Hence it is not only the third pillar but also the Central pillar of the democratic state. If the judiciary is to perform its duties and functions effectively and remain true to the spirit with which they are sacredly entrusted to it, the dignity and authority of the courts have to be respected and protected at all costs. Otherwise, the very cornerstone of our Constitutional scheme will give way and with it will disappear the rule of law and the civilized life in the society. That is why it is imperative and invariable that court orders are to be followed and complied with.

31. To prove contempt of court order, an applicant must show that there is a court order with unambiguous terms directed to the Respondent, that the Respondent was aware of the terms of the court order and that they wilfully breached the terms of the order. In the case of *Katsun Limited v Kapurchad Depor Sha* [2016] eKLR, the court held that;

In order for an application to succeed in civil contempt proceedings, the applicant has to prove the terms of the order, knowledge of the terms by the respondent, failure by the Respondent to comply with the terms of the order.

32. Similarly, in the case of *Cecil Miller v Jackson Njeru & another* [2017] eKLR the court stated the elements to be proved in an application for contempt as follows:

- a) The terms of the order/or injunction or undertaking, were clear and unambiguous and were binding on the defendants.
- b) The defendant has knowledge or proper notice of the terms of the order.
- c) The defendant has acted in breach of the terms of the order and
- d) The defendant's conduct was deliberate.

33. The standard of proof of civil contempt is higher than on a balance of probabilities, but slightly lower than the standard of proof in Criminal Cases; that of beyond reasonable doubt. This is because where contempt is proved, the contemnor may be jailed and lose their liberty and therefore contempt ought to be proved on that higher standard in tandem with the gravity of the consequences of contempt. In the case of *Mutikika v Baharini Farm Limited* [1985] LR 229. 234, the Court of Appeal held as follows;

In our view, the standard of proof in contempt proceedings must be higher than proof in the balance of probabilities, almost but not exactly, beyond reasonable doubt ought to be left where it belongs, to wit in Criminal cases. It is not safe to extend it to an offence which can be said to be quasi-criminal in nature.

34. Looking at the assertions of the Plaintiff is there proof that the elements of contempt have been satisfied to the required standard against the four Interested Parties?

35. The orders made on 14th April 2021 were clear and unambiguous. They required of the Plaintiffs, the Defendant and the Interested Parties not to develop, alienate, trespass or encroach on the land known



as LR No. 18990 IR No. 127415, Sabaki Estate Machakos, pending hearing and determination of the suit. Therefore, the obligation to obey the clear terms of those orders were placed on all the parties herein including the four Interested Parties. The orders were made on 24th March 2021 and extended on 14th April 2021, till determination of the suit. Those orders were made pursuant to the application dated 16th March 2021 filed by the Interested Parties. I therefore find and hold that as those orders were granted at the instance of the Interested Parties, the Interested Parties were well aware of the same.

36. The Plaintiff alleged that the Interested Parties have defied these orders of 14th April, 2021. He stated that on 20th September 2021, he visited the suit property and found that there were construction workers thereon who abused him. In response to whether the Interested Parties are in contempt, they relied on the survey report prepared by Covenant Geo Survey Systems, which according to them, the report shows that Parcel LR No. 18990 is not adjacent to or within the same locality as LR No. 20433 and LR No. 20434. What I understand them to be saying is that their surveyor's report has determined the issue of locality so that since the orders herein of 14th April, 2021 referred to LR No. 18990 and not to LR No. 20433, 20434 and 20153, then they can as well continue constructing on the latter because that would not amount to trespass because their parcels are not referred in the order of 14th April 2021.
37. This thinking in my view is most dishonest as it is the Interested Parties who obtained stay of the injunction in respect of Parcel LR No. 18990 and sought to be joined to this suit on the basis that the orders obtained by the Plaintiff to have the buildings on LR No. 18990 demolished were being used with intend to demolish their properties aforesaid. The Interested Parties are on record that the issue for determination between them and the Plaintiff is the locality of the suit property. That matter has not been determined by this court and therefore it is absurd for the Interested Parties to purport to rely on their surveyor's report as a determination on the issue of the locality which they have framed as being the main issue is still in dispute. The correct position is that the disputed property is one. That property is described by the Plaintiff as LR No. 18990, while the Interested Parties refer to it as LR Nos 20433, 20434 and 20153. But the duty to give it the correct description belongs only to the court and not the parties or their surveyors. That single disputed property is the same property that this court on 14th April, 2021 issued orders of status quo stopping all the three sides in the dispute herein, namely the Plaintiff, the Defendant and the Interested Parties from developing, alienating, trespassing or encroaching thereon. In any event the surveyors report relied on by the interested parties is not based on any Cadastral Survey approved by the Director of Surveys for it to show the location of the property.
38. As the Interested Parties confirm that they are constructing on LR. Nos 20433, 20434, 20153, because according to them those are not LR 18990, it is the finding of this court that the four Interested Parties had knowledge of the orders of 14th April, 2021, but they wilfully and flagrantly breached the same, by hiding behind their surveyor's report.
39. In the premises, this court makes the following orders;
 - a) The 1st, 2nd, 3rd and 4th Proposed Interested Parties be and are hereby joined to these proceedings as Interested Parties.
 - b) The Interested Parties are granted leave of 14 days to file and serve their pleadings in this matter.
 - c) The 1st, 2nd, 3rd and 4th Interested Parties namely Michael Ochieng Obiero, Saadi Ali Alio, David Mutema and Adan Halake Boru are found to be in contempt of court for disobeying the orders of this court made on 14th April 2021.
 - d) The 1st, 2nd, 3rd and 4th Interested Parties/Contemnors are ordered to appear before court on 22nd February 2023 for mitigation and sentencing.



e) Costs of the two applications herein shall be in the cause.

40. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 8TH DAY OF
FEBRUARY 2023 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM**

A. NYUKURI

JUDGE

In the presence of;

Mr. Muturi the Plaintiff in person – present

No appearance for the Defendant

No appearance for the Proposed Interested Parties

Josephine – Court Assistant

