



Waikau & 2 others (Suing as the Administrators of the Estate of the Late Nahashon Samuel Waikau) v Mburu t/a Mwewe Camp (Environment & Land Case 128 of 2019) [2023] KEELC 17202 (KLR) (5 May 2023) (Ruling)

Neutral citation: [2023] KEELC 17202 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 128 OF 2019**

FM NJOROGE, J

MAY 5, 2023

BETWEEN

EMILY WAMBUI WAIKAU 1ST PLAINTIFF

DAVID MIKIRA WAIKAU 2ND PLAINTIFF

NANCY NJERI KIMANI 3RD PLAINTIFF

**SUING AS THE ADMINISTRATORS OF THE ESTATE OF THE LATE
NAHASHON SAMUEL WAIKAU**

AND

CHUMA MBURU T/A MWEWE CAMP DEFENDANT

RULING

1. This is a ruling in respect of the Plaintiffs' Notice of Motion dated February 15, 2023 that seeks the following orders:
 - a. Spent.
 - b. That this honourable court be pleased to issue order of eviction demolition of illegal fence erected on the suit property LR Gilgil/gilgil Block 1/3037 (kikopey) and the warrants of eviction to be executed by court bailiffs John K. Wanderi t/a JK Wanderi Auctioneers.
 - c. That the OCS Gilgil police station be ordered/directed to provide security during the execution of the warrants of eviction and demolition of the illegal fence.
 - d. THAT costs of this application be borne by the Defendants.
2. The application is supported by the affidavit sworn by Lucy Njeri Kimani sworn on February 15, 2023. She deposed that they had sought for orders directing the Defendant to pull down illegal structures he



had erected on the suit land LR Gilgil/gilgil Block 1/3037 (Kikopey); that the suit property was part of their late father's estate and vide a consent judgment recorded on October 27, 2020, the Defendant was to vacate the suit land within eight (8) months; that in default an eviction order was to issue against him and the Plaintiffs be at liberty to demolish the structures erected thereon; that the Defendant in partial compliance pulled down the main structures but left a fence erected on the western side of the suit land bordering land parcel L.R Gilgil/Gilgil Block 1/15604 thereby hiving off part of the suit land; that the Defendant is not the owner of the above suit land but owns LR Gilgil/Gilgil Block 1/3043 which is on the southern part of the suit land hence the mystery of the said fence; that in an attempt to enforce the judgment, she hired workers to pull down the illegal fence erected by the Defendant and fenced off the suit property after the surveyor had identified the correct positions of the beacons but the Defendant re-erected the illegal fence inside the suit property; that the said fence has hived off part of the suit property and that the Defendant has since threatened to use force against them if they remove the said re-erected fence; that it would be fair and just for this Honourable court to issue orders for removal and/or demolition of the illegal fence erected by the Defendant and that the OCS Gilgil police station provide security

Response

3. The Defendant filed his replying affidavit sworn on March 21, 2023 on the same day. He deposed that they indeed recorded consent to the effect that he removes his structures on the Plaintiffs' land which he complied. He deposed that he then proceeded to fence his land according to the beacons present.
4. He further deposed that he requested the Plaintiffs that they call the regional surveyor to confirm that he no longer occupies the land but they have still insisted that he is on their land. He requests that before any eviction order is issued, the regional surveyor do visit the suit land and determine whether the alleged fence has encroached on the Plaintiffs land.
5. The Defendant deposed that a joint survey ought to be done to ascertain that he vacated the Plaintiffs' suit land. He added that the Plaintiff alleged that he has erected a fence hiving off $\frac{1}{2}$ an acre in paragraph 7 while in paragraph 10 stated that he has hived of $\frac{1}{4}$ of an acre of the suit property.
6. In conclusion, he stated that he does not oppose the Plaintiffs subdividing their land and taking occupation but added that they should not do so in the absence of the neighboring plots despite beacons being placed.

Submissions

7. The Plaintiffs filed their submissions dated March 17, 2023 where they gave a brief background of the case and identified one issue for determination which is whether the court should grant eviction orders as sought by the applicant. The plaintiffs then reiterated the contents of their supporting affidavit to the present application.
8. They relied on the case of *James Mathura Makewa V Nzari Nguli* (2021) eKLR and Section 107 of the *Evidence Act*. The Plaintiffs submitted that they have established a prima facie case which warrants the orders prayed for. They further submitted that they are likely to suffer irreparable harm if the orders sought are not granted since the Defendant's actions have hindered them from subdividing and quietly enjoying possession of their suit property.
9. The Plaintiffs relied on Section 27 of the *Civil Procedure Act* and submitted that they are entitled to the costs of this suit.



10. The Defendant filed his submissions dated March 22, 2023 on the same day where he identified only one issue for determination, which is whether the Plaintiffs/Applicants are entitled to the reliefs sought. He relied on Regulation 65 of Legal Notice 280 of 2017 (*Land Regulations*) and Section 152E of the *Land Laws (Amendment) Act* No 28 of 2016 and submitted that in the instant case he has already vacated the suit property thus eviction orders cannot issue. He submitted that the bone of contention is whether the Defendant has constructed a fence around the suit land. He however submitted that the fence is placed as per the beacons well within the Defendant's boundaries and property.
11. He submitted that he had reached out to the Plaintiff to engage a surveyor to determine whether the fence was in their property but they have since ignored him.
12. In conclusion, he urged the court to dismiss the application with costs and order that a joint surveyor visit the suit property to determine whether the fence has encroached upon the Plaintiffs' property and whether the Defendant has indeed vacated the Plaintiffs' property.

Analysis and Determination

13. This court has considered the application and pleadings and is of the view that the main issue for determination is whether the Plaintiff/Applicant is entitled to the orders sought.
14. It is not in dispute that on October 27, 2020 the parties herein recorded a consent judgment which was entered in favour of the Plaintiffs against the Defendant who was ordered to vacate the suit land within 8 months from the said date. It was term of the said consent judgment that in default of the same, an eviction order was to issue against the Defendant and the Plaintiffs be at liberty to demolish the structures erected thereon at the Defendant's cost.
15. This court has noted the inconsistency with regard to the Plaintiffs allegation as to the exact portion of the suit property that has been hived off by the Defendant. It is not clear as to whether it is $\frac{1}{2}$ or $\frac{1}{4}$ as alleged by the Plaintiffs in their supporting affidavit. This court cannot overlook such vital information yet the Defendant claimed that he fully complied with the orders of the consent judgment.
16. In view of the circumstances, this court is of the view that it would be in the interest of justice that both parties must first ascertain the correct boundaries to their respective plots and this can only be done by a qualified surveyor who can then correctly establish whether the alleged illegal fence has hived off part of the Plaintiffs property and to what extent. There is no Surveyor's Report establishing encroachment and any venture to issue orders in respect of the instant application would amount to sheer guesswork.
17. I therefore find that the Plaintiffs application dated February 15, 2023 is without merit and the same is hereby dismissed.
18. I further direct that both parties, while equally sharing the survey expenses, engage a joint surveyor to conduct a survey in order to establish whether the Defendant's re-erected fence has encroached into the Plaintiffs property and by what extent. The said report to be filed in court within 30 days from the date of this ruling.
19. The expenses of the survey exercise shall be borne equally by the plaintiff on the one hand and the defendant on the other. If one party delays or deliberately or otherwise fails or defaults to pay their share the opposite party shall pay the whole of the survey expense sum and then lodge a formal demand in writing to the defaulting party who shall remit the sum claimed within 7 days of the demand in default of which the party not in default shall be entitled to execute against the defaulting party for the said sum as though they were costs of a suit. Each party shall bear its own costs of the application.



20. This matter shall be mentioned on 6/6/2023 to receive the surveyor's report and for further directions of the court.

21 It is so ordered.

DATED, SIGNED AND DELIVERED AT NAKURU VIA ELECTRONIC MAIL ON THIS 5TH DAY OF MAY, 2023.

MWANGI NJOROGE

JUDGE, ELC, NAKURU

