



Kencent Holdings Limited & another v Matsese & 330 others & 2 others (Environment and Land Case Civil Suit 123 of 2009) [2023] KEELC 18455 (KLR) (5 July 2023) (Ruling)

Neutral citation: [2023] KEELC 18455 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND CASE CIVIL SUIT 123 OF 2009
SM KIBUNJA, J
JULY 5, 2023**

BETWEEN

KENCENT HOLDINGS LIMITED 1ST PLAINTIFF

KENYA NATIONAL ASSURANCE CO 2ND PLAINTIFF

AND

MATI CHARO MATSESE & 330 OTHERS 1ST DEFENDANT

HON. ATTORNEY GENERAL 2ND DEFENDANT

**SECRETARY TO THE COUNTY GOVERNMENT OF
MOMBASA 3RD DEFENDANT**

RULING

1. On January 27, 2023, the court directed that the two applications dated the December 29, 2021 and March 28, 2022 be heard together through written submissions to be filed within the timelines given. The application dated the December 29, 2021 was brought under order 9 rule 9 (a) and order 51 of the Civil Procedure Rules, section 3A of the Civil Procedure Act, section 19 (1), (2) and 20 (2) of the ELC Act and seeks for;
 1. “Spent
 2. That this honourable court be pleased to grant leave to the firm of Khaminwa & Khaminwa Advocates to come on record for the defendants/applicants and the notice of appointment filed herein be deemed to have been filed and served with the leave of the court.
 3. That this honourable court be pleased to stay execution of the 2nd plaintiff/respondent letter of offer to sell dated December 6, 2021 and any other subsequent letters of offer to sell addressed to all defendants/applicants hereinafter referred to squatters on the suit property described



as plot LR No 397/MN (original No 181 & 187) CR No 1940 pending the hearing and determination of the application and or until further orders of this honourable court.

4. That the 2nd plaintiff/respondent offer to sell dated December 6, 2022 be stayed until orders dated October 31, 2019 are fully complied with.
5. Any other relief the court may deem fit to grant.
6. That costs be provided for.”

The application is grounded on eight (8) grounds on its face and supported by the affidavit of one Kalama Tsori Weda, one of the 1st defendants, in which he inter alia deposed that on October 31, 2019, the court reviewed its judgement and issued new orders, which meant that the defendants would purchase the suit land in a court supervised process. That the 2nd plaintiff/respondent has since disregarded the said process and issued letters of offer dated December 6, 2021 to the 1st defendants, demanding diverse payments from the defendants/applicants for the parcels of land within the suit property. The deponent maintained that the orders of October 31, 2019 directed the plaintiffs/respondents to file various reports with the court, one of them being a valuation report that would have guided the sale of the suit property. The deponent contended that the plaintiffs/applicants have totally disregarded the said orders and no report has been filed in court as directed in the said orders, and urged the court to allow the application, lest they suffer irreparable loss and damage as a result of the plaintiffs' injustices.

2. The 2nd plaintiff/respondent responded to the application vide a replying affidavit sworn on February 16, 2022 sworn by Tabitha Mwaniki, the Acting CEO and Secretary to the 2nd plaintiff's board, among others opposing the application, terming it as unmerited, untenable and filed in bad faith, and that it was an afterthought with the intention of delaying the realization of the judgement by the plaintiffs. The 2nd plaintiff/respondent deposed that Kalama Tsori Weda has no authority to file or act on behalf of the defendants since the minutes attached were only signed by 6 people out of the 330 defendants. That the said Kalama had no authority to act for the 330 defendants, or the 1448 squatters in this matter and that as per the court records, the appointed representative was Alfred Muzungu No 216 and there is no evidence he has relinquished the said capacity. That the orders in contention dated 3 October 1, 2019 emanated from the application dated October 5, 2018, where the court initially, partially allowed part of the application by consent on February 12, 2019 and further orders on the April 24, 2019 before eventually hearing the parties on prayers 2 and 10 and rendering its decision vide the ruling delivered on the October 31, 2019. That after the orders that were issued on February 12, 2019 by consent, the 2nd plaintiff requested the assistance of the PS National Treasury, to seek help from the Principal Secretary, Ministry of Lands and Physical Planning, in implementing the court order *vide* the letter of March 7, 2019. That a multi-agency team was formed and after the court appearance of the April 24, 2019, the process of implementing the orders commenced on the public meeting of April 29, 2019 for enumeration of the squatters on the suit land. That the people were addressed by the officers representing the various offices in the multi-agency team. That they were informed that a valuation on the land would only be done once the survey was complete and the area occupied by each person determined. That was to form the basis of the value for each individual parcel of land was to be given. That the squatters' enumeration exercise was carried out for 21 days from the April 29, 2019 to the May 17, 2019, in a squatter-led process facilitated by the 2nd plaintiff who paid the committee members supporting the enumeration exercise some lunch allowances. The squatters were involved in the identification of their individual plots as well as the planning and survey of their plots. That in September of 2021, after the Registry Index Map was approved by the Director of Survey, a ground



verification exercise of the beneficiaries was conducted against RIM, for a period of seven (7) days during which period residents were able to confirm their details as captured in the Map and the Area list. That after the ground verification was completed, the verified documentation was forwarded to the Valuer to conduct the valuation. The deponent however maintained that the 2nd plaintiff/respondent did not participate in the valuation exercise apart from submitting the survey report to the valuer. The valuation report dated the October 6, 2021 was used to issue letters of offers to the squatters, which notified each of them the value of their individual plots. That out of the 1448 squatters identified after the subdivision, only 114 have not collected their letters of offer. Before the letters of the offer, the 2nd plaintiff held a meeting chaired by the Deputy County Commissioner, Nyali with the committee members where they were informed that the letters of offer would be issued from December 6, 2021 from the 2nd plaintiff's offices at NSSF building in Mombasa. They were also told that the valuations of the individual properties would be conveyed to the individual owners while the full valuation report would be filed in court. That the reports that were required under the order of October 31, 2019, to be filed with the court were not filed within the timelines given, due to the process taking longer than expected and the effects of Covid 19 pandemic. The said reports were filed in court on the December 8, 2021 by the Attorney General, vide the list of documents, before the instant application was filed on the December 29, 2021. That the stay order sought should not issue as out of the 1313 people who have collected their letters of offer, 19 have committed to pay the 10% deposit and only the seven (7) people represented by the applicants have raised complaints.

3. The 2nd defendant opposed the application through the replying affidavit of Victor Otieno Olonde, the Principal Valuer under the Ministry of Lands and Physical Planning, and the valuer in charge of the valuation department Mombasa Land office, sworn on the February 17, 2022. He deponed that he was among the officers involved in the implantation of the court orders issued on the February 12, 2019 and April 24, 2019. That upon receiving the report *vide* the letter dated the July 29, 2019 from the 2nd plaintiff, he commenced the valuation exercise by visiting the land between the July 30, 2019 to August 8, 2019. They found the land was fully occupied by residents who had put up permanent and temporary structures. That the structures were however not included in the valuation. That after receiving the approved survey plan and the Area list through the letter dated the September 28, 2021, he completed the valuation exercise. That valuation is a professional function guided by the valuation principles and requires a valuer to make independent observations and findings based on their expertise and circumstances of the subject property.
4. The 1st defendants filed a further affidavit sworn by Kalama Tsori Weda on the April 1, 2022 responding to the two replying affidavits, among others deposing that the report required under the order of October 31, 2019 is yet to be filed and adopted by the court; that the filing of reports by the Attorney General before the orders of January 19, 2022 shows that the letters of offer dated the December 19, 2021 were illegally issued and in contravention of the orders of the October 31, 2019. On his capacity to act for the other members, the deponent deposed that the letter of authority was prepared on the December 19, 2021 and filed on the December 29, 2021 but his counsel failed to serve it. That the failure to serve the letter of authority is a technicality which can be cured by article 159 of the [Constitution](#). That the report they participated in was done before the order of October 31, 2019 and is annexed to the affidavit in support of the chamber summons he swore on February 17, 2022 marked KTW-2, seeking to strike out the report dated October 5, 2021 that was fraudulently made without their participation or consent and filed by the AG. That members who had started making payments for the plots did so after threats, fear and lack of knowledge, but are among those who have authorized him to file the instant application. That the 1st defendants are likely to suffer irreparable loss and damages by the plaintiff illegally repossessing the suit property without complying with the court order of October 31, 2019.



5. The 1st plaintiff also opposed the application through their seven (7) grounds of opposition dated the January 25, 2023 *inter alia* that the application is defective; that the minutes of December 19, 2022 allowed Kalama Tsori Weda and others named there to sign petition documents and not supporting affidavit to the application and that Ms Khaminwa & Khaminwa Advocates are not properly on record.
6. The application dated the March 28, 2022 was brought by the 2nd plaintiff under order 22 rule 20, order 51 rule 1 of the Civil Procedure Rules, section 1A, 1B, 3A and 63 (e) of the Civil Procedure Act, section 13 (2), (3) 19 (1) of the ELC Act, and seeks for:
 1. That this honourable court be pleased to issue orders that the forty-five (45) days period for submitting acceptance of the offer letter issued to the 1349 defendants has since lapsed and having not received the acceptance, the offer within the requisite period, the offer letters be deemed to have been declined by the respective defendants.
 2. That this honourable court be pleased to issue orders allowing the plaintiffs to sell the 1426 parcels of land being a subdivision of the suit property known as plot No LR No 397/MN (originally No 181 and 187) CR No 1940 where the defendants have not accepted their offers by competitive bidding to the general public in furtherance of the orders issued on October 31, 2019 by the Honourable Justice C.K Yano.
 3. That the honourable court be pleased to order that the proceeds of the sale obtained pursuant to prayer 2 above be deposited in the joint account opened by the plaintiffs pursuant to the orders issued on October 31, 2019 by the Honourable Justice C.K Yano.
 4. That the honourable court be pleased to order that the terms of prayer 2 above once issued also extend to the 99 squatters who were served by Newspaper advertisement on March 1, 2022 pursuant to the orders issued on January 31, 2022 by the Honourable Justice S. Munyao J and advised to collect their offer letter and after the lapse of 45 days from the date of the advertisement, the above orders do extend to any of the squatters who will not have accepted the order and or collected their letter of offer.
 5. That costs of this application be in the cause.

The application is premised on the ten (10) grounds and supported by the affidavit of Tabitha Mwaniki, the 2nd plaintiff/applicant acting CEO and company secretary, sworn on the March 28, 2022, deposing *inter alia* that they have complied with the court orders issued on October 31, 2019; that the 2nd plaintiff has submitted a status report as at February 15, 2022, which showed that 1310 squatters had collected their letters of offer and only 17 of them had committed to the payment of 10% deposit; that it is unfair for the squatters to continue occupying the suit land, while declining to make any payments; that the court should allow the plaintiffs to sell the 1426 parcels of land emanating from the suit property, where the defendants have not accepted the letters of offer pursuant to the orders of October 31, 2019; that the plaintiff be allowed to offer the said plots for sale by competitive public bid to be conducted, and the proceeds thereto be deposited in a joint account opened by the plaintiffs pursuant to the orders issued on January 31, 2022. No replies have been filed in respect of this application.

7. On the file is also a chamber summons application dated the February 17, 2022 filed by the 1st defendants through Ms Khaminwa Khaminwa Advocates *inter alia* seeking for the planning brief for Kwa Bulu Squatter Formalization Scheme, RIM, Valuation Report dated October 6, 2021, Survey



Report dated June 4, 2021 and filed in court by the 2nd defendant to be struck out and expunged from the court record and fresh survey to be conducted and report filed in compliance with the order of October 31, 2019. The nature of the prayers in the other two applications is such that their determination will substantially have an impact on the prayers in this chamber summons. The court therefore finds it appropriate to have all the three applications considered together on the material before it. There is no evidence of service of this application and no replies have been filed.

8. The learned counsel for the 1st defendants filed their written submissions on the application dated the December 29, 2021 on the April 25, 2022. The learned counsel for the 2nd plaintiff filed their initial submissions on the May 4, 2022 and further submissions on the March 30, 2023, while that for the 1st plaintiff filed theirs on the March 31, 2023. The court has considered the submissions by the learned counsel.
9. On the January 25, 2023, the counsel for the 1st plaintiff and the 2nd defendant informed the court that they are not opposed to the 2nd plaintiff's application.
10. The following are the issues for the courts determinations;
 - a. Whether the 1st defendants have established disobedience of the court orders by the 2nd plaintiff, and if so what orders to issue.
 - b. Whether the 2nd plaintiff has established disobedience of the court orders by the 1st defendants, and if so, what orders to issue.
 - c. Whether the documents filed by the 2nd defendants on the
 - d. Who pays the costs in each of the two applications.
11. The court has carefully considered the grounds on each of the three applications, the affidavit evidence, submissions by the learned counsel, the superior courts decisions cited and come to the following conclusions;
 - a. The point to start is whether or not Ms Khaminwa & Khaminwa Advocates are properly on record for the 1st defendants/applicants. The said firm filed the notice of appointment of advocates dated the December 29, 2021 with the notice of motion under certificate of urgency of even date. The notice of appointment inter alia indicates that "the defendants herein Mati Charo Matsese & 330 others have appointed the firm of Khaminwa & Khaminwa advocates to act for them forthwith." That prayer 2 in the notice of motion seeks for the "court to be pleased to grant leave to the firm of Khaminwa & Khaminwa Advocates to come on record for the defendants/applicants and the notice of appointment filed herein to be deemed to have been filed and served with leave of the court." The record shows that during the mention of January 31, 2022, Ms Wekesa h/b for Khaminwa for 1st defendant. That Mr Makuto for the AG raised a concern on how Dr Khaminwa had come in the matter when there was a judgement. That after the subsequent court attendances of April 5, 2022, April 26, 2022 and May 5, 2022, the court delivered a preliminary ruling on the application dated the December 29, 2021 in respect of prayer 2 on the July 14, 2022 directing as follows;
 - "5. I have gone through the application, and indeed, nowhere does it indicate that among those to be served, is the law firm of M/s Mabeya Buti & Company Advocates. It means therefore that there is no notice to the outgoing advocate contrary to what rule 9(a) above requires since there is no consent that has been filed between the existing advocate and the proposed incoming advocate.



6. Before I can delve into the merits of the application, there needs to be strict compliance with the provisions of order 9 rule 9. I therefore direct that the law firm of M/s Mabeya Buti % Company Advocates first be served with this application. It is only upon being certified of service, or if a consent is filed, that I can address myself to prayer (2) of the application. I am unable to canvass the other issues in the application before counsel properly comes on record.”

During the hearing of the application on the July 25, 2022, the issue of the Ms Khaminwa & Khaminwa Advocates being on record for the 1st defendants was raised again, wherein Mr Yose indicated that they had filed a consent on the July 18, 2022 but had not served. The court placed the matter aside and directed counsel to serve the consent. When the matter was called later the same day, a concern was raised on whether the firm was taking over the conduct of the suit for one or all the 1st defendants, and after Mr Yose confirmed that it was taking over for all the 1st defendants, the court directed that;

“ If Mr Yose is taking over for all defendants then an appropriate consent be filed.”

I have perused the proceedings that followed and the record and have not seen evidence of a consent in compliance with the directions of July 25, 2022 having been filed. The only consent on the record is that dated the July 14, 2022 and filed on the July 18, 2022.

- b. In their submissions dated the April 22, 2022, Ms Khaminwa & Khaminwa Advocates have submitted that they have complied with the requirements of order 9 rule 9 of Civil Procedure Rules as they have filed a consent between themselves and the outgoing counsel, as well as moving the court for leave. The learned counsel for the 2nd plaintiff submitted that there is no evidence of service of the application upon Ms Mabeya Buti & Company Advocates. That it is not clear how many defendants the firm seeking leave are coming on record for as the figure keep oscillating from 1000, 1400 and 524. In the submissions by the learned counsel for the 1st plaintiff, it is submitted that Ms Khaminwa & Khaminwa Advocates have not complied with order 9 rule 9 of the Civil Procedure Rules which is in mandatory terms and cannot be wished away as a procedural technicality. The court has considered the submissions by all the learned counsel and the superior courts decisions cited thereon on the import of order 9 rule 9 of the Civil Procedure Rules, and even though there was no further consent filed after the one dated the July 14, 2022 and filed on the July 18, 2022, the fact that that one filed had been signed by Ms Mabeya Buti & Company Advocates is evidence enough that they had notice of the intention of Ms Khaminwa & Khaminwa Advocates to come on record for the 1st defendants herein, through the leave sought *vide* the notice of motion dated the December 29, 2021. That fact taken together with Mr Yose’s confirmation from the bar on the July 25, 2022 leaves the court with no doubt that the firm of Khaminwa & Khaminwa Advocates was seeking for leave to come on record for all the 1st defendants. Accordingly, the leave sought is granted and counsel directed to file and serve a proper notice of change of advocates within the next seven (7) days from the date of this ruling.
- c. The applications dated the December 29, 2021 and the February 17, 2022 by the 1st defendants have no prayer for joinder of any other person(s) to be part of the 1st defendants and the submissions on joinder by their counsel is taken to be without basis and will not be considered.
- d. It is not disputed that the plaintiffs filed this suit *vide* a plaint dated April 27, 2009 against the defendants. That on the October 12, 2011, the court delivered its judgement in favour of



the plaintiffs, in which it found the defendants to be trespassers on the plaintiffs' land and ordered their eviction with the assistance of Bamburi Police Station. The plaintiffs were unable to evict the defendants over the years that followed. The orders of eviction were subsequently reviewed on March 4, 2014, when the court directed that the orders be enforced by the County Commissioner Mombasa, alongside the Inspector General of Police and Secretary to the County Government of Mombasa. That through the Attorney General appealed against the said orders the parties later entered into a consent, and the court then directed the parties to pursue negotiations to solve the issue.

- e. Pursuant to the said directions, the 2nd plaintiff filed an application dated October 5, 2018, where they sought for the enumeration of all the persons living on the suit land, the subdivision of the suit land into individual portions occupied by the defendants, and valuation of each of the portions to enable the purchase of the same by the defendants. The purchase by the defendants would be financed by the Land Settlement Fund Trustees and later followed by the processing of title deeds. All these processes would be carried out under the supervision of the court. The application was heard, and initially partly allowed in terms of prayers 1, 3 and 4 on the February 12, 2019. The other prayers were then scheduled for hearing on the March 21, 2019 when the court *inter alia* directed that the orders of February 25, 2019 be effected by the Deputy County Commissioner Kisauni. During the subsequent hearing of April 24, 2019 an order allowing prayers 1, 3 to 9 by consent was entered with a further order for prayers 2 and 10 to be argued through written submissions and prayers 11 to 13 to follow the event. Then on October 31, 2019 the court determined the said application and issued the following orders;
 1. "That this honourable court be and is hereby pleased to vary and or review the decree and order issued by this honourable court on the March 14, 2014 by Honourable S. Mukunya (Mr) Justice.
 2. That the Government through the Deputy County Commissioner, Kisauni sub county be and is hereby ordered to carry out an enumeration of all people settled on the suit property. The enumeration report to be submitted to court within thirty (30) days from the date of the court order which report shall be the basis of further dealings with the land.
 3. That the government through the deputy county commissioner, Kisauni sub-county be and is hereby ordered to carry out an enumeration of all people settled on the suit property. the enumeration report to be submitted to court within 30 days from the date of the court order which report shall be the basis of further dealings with the land.
 4. That the people identified in the enumeration though not included in the list of the defendants be enjoined into the suit as long as they continue occupying the land. any dispute over ownership of the individual plots be resolved during the enumeration.
 5. That the County Physical Planner be ordered to plan the settlement in accordance with the law and give a report within 30 days from the date the enumeration report is submitted to the court.
 6. That the County Surveyor based on the report by the physical planner to survey the portions occupied by each squatter and carry out a subdivision of the property and report to court within a specified period of within 30 days from the date the physical planning report is submitted in court.
 7. That upon receipt of the subdivision plan the county valuer be ordered to carry out a valuation of each portion of land whether vacant or occupied which will determine the value of each plot



and report to court within a period within 30 days from the date the survey report is submitted to court.

8. That the individual occupants of the plots be given an offer to buy the portions they occupy at the value set by the county valuer and any person who is unable to pay cash for the report be offered an opportunity to apply for a loan from any financial institution or the land and settlement fund board trustee within the specific period of 60 days from the date of the valuation report submitted in court. The letter of offer should be accepted within 45 days and a report on the accepted offers to be submitted to court within 60 days.
9. That upon payment of the full purchase price or obtaining a loan from financial institutions or land settlement fund board of trustees the certificate be proceeded and be given to the individual buyers within a period of 60 days from the date of acceptance of offer.
10. That the proceeds of sale after payment of all the costs of physical planning, survey, valuation and issuance of certificates of title be apportioned between Kencent Holdings Limited and Kenya National Assurance Company (2001) Limited in accordance with their interest in the land which is a ratio of 20:80. 20% to Kencent holdings limited in accordance with their 20% deposit paid for the land and 80% to Kenya National Assurance Company (2001) Limited representing the unpaid balance of the sale price.
11. That all the processes of sale shall be carried out under the supervision of the court.
12. That there be liberty to apply to the court by any of the parties.
 - f. From the reading of the orders of October 31, 2019, the court was directing the plaintiffs to create a land settlement plan which would be a long term land dispute resolution to the over 300 landless defendants occupying the 86-acre suit land. The court was clear that the process would be done under its supervision, where the parties involved would be reporting back to court by filing reports in respect of the specified steps to be undertaken in the process. The process of creating the settlement scheme for the defendants would involve the following steps among others;
 - i. The first step was the enumeration of all persons residing in the suit land and report thereof filed with the court in 30 days from date of the order. [order 3];
 - ii. The second would be the creation of a settlement scheme in accordance with the law by the Physical Planning officer and filing of the report with the court in 30 days from the date of the enumeration report. [order 5];
 - iii. The third would be surveying and subdividing the suit land into portions occupied by each squatter as per the Physical Planner's report, and the surveyor's report thereof to be filed with the court in 30 days of the Physical Planner's report. [order 6];
 - iv. Fourthly, was the valuation of each plot created from the suit property and report thereof to be filed with the court in 30 days of the surveyor's report. [order 7];
 - v. Followed by issuance of letters of offer to each occupant of the plots thereon, acceptance, payment and or arrangement for financing to purchase the said portions. The report on the offers accepted to be filed with the court in 60 days. [order 8]; and



- vi. The issuance of title deeds to each individual buyer in 60 days from the date of acceptance of the offer. [order 9]

It is clear from the above that the court had required a report to be filed after the completion of each of the specified activities. This was to enable the court ensure compliance and to avail itself of the opportunity for further directions if necessary.

- g. Order No 3 and 4 directed the government through the Deputy County Commissioner, Kisauni sub-county to carry out an enumeration of all people settled on the suit property. That the people identified in the enumeration that may not be in the list of the defendants were to be enjoined into the suit, as long as they continue occupying the land, and that any dispute over ownership of the individual plots be resolved during the enumeration. Upon completion of the enumeration exercise, a report was to be filed with the court within 30 days from the date of the court order. That enumeration the report was to be the basis of further dealing with the land. The 2nd plaintiff stated that a multi-agency was created and held a public meeting on the suit property chaired by the Deputy County Commissioner, Nyali on April 29, 2019. The filing of the enumeration report with the court was among others to enable any of the parties interested in confirming that the process was as directed to apply for a copy from the court for their scrutiny and to guide in the joinder of the squatters who were not defendants in this suit, but are occupying portions of the suit land.
- h. Article 10 (2) of the Constitution 2010 provides for public participation, social justice, transparency and accountability as some of the principles of governance. The plaintiffs and the Deputy County Commissioner, through the multi-agency team created was obligated to ensure that the whole process of the establishment of the settlement scheme involved public consultations of the defendants as the beneficiaries among other relevant stakeholders. It is paramount for the parties to remember that the court had directed that the enumeration report would form the basis for further dealings with the suit land. It was therefore mandatory for the plaintiffs to file the said report with the court. The 2nd plaintiff has deposed that the enumeration exercise was conducted for 21 days from the 29th April to May 17, 2019, where the squatters were mobilized by their appointed leaders who were part of a committee. To support this, the 2nd plaintiff annexed list of payments advanced to these committee members during the said exercise. However, no evidence has been presented before court as to how these committee members were appointed, how the exercise was conducted or even the outcome of enumeration exercise. The 1st defendants position that no enumeration report was filed within the thirty (30) days or any other time thereafter has not been challenged by the other parties. The court has perused the record and seen the list of documents dated the February 8, 2022 and noted the enumeration report is not among the documents thereon. It is therefore clear that the plaintiffs failed to comply with the court order requiring the enumeration report to be filed with the court within 30 days or at any other date thereafter. The court expected to receive an enumeration report that would have included the minutes of the various consultation meetings that were held between the multi-agency team and the defendants/squatters/residents and the issues discussed and adopted in the said meetings. The report would also have included a list of all the defendants/squatters identified in the exercise and those not included in the suit, that were to be joined as defendants.



- i. Order number 5 of October 31, 2019 directed the County Physical Planner to plan the settlement in accordance with the enumeration report and the law, and file a report with the court within 30 days from the date of the enumeration report. The planning process too would have been community driven where all the identified squatters and stakeholders would be involved through community sensitization forums aimed at the community understanding the planning and survey processes, as well as the mapping and delineation of settlement boundaries. The process would then generate a base map of the settlement scheme and a physical development plan as well as survey plan for the settlement. The plan would then be presented to the squatters for endorsement and approval ensuring that all the beneficiaries are well captured. The 2nd plaintiff claim that the adoption of the plan by the County Assembly was a challenge as a result of the Covid 19 restrictions. It is further maintained by the 2nd plaintiff that the report was approved by the County Assembly on October 13, 2020, and submitted to the Director General, Department of Physical Planning on January 12, 2021 and approved by the Cabinet Secretary Ministry of Lands and Physical Planning on March 4, 2021. That report was not however filed with the court as required, denying it the opportunity to oversee the process and enable any interested party to obtain a copy thereof.
- j. Orders numbers 6 and 7 directed the County Surveyor to survey the portions occupied by each defendants/squatters based on the plan created by the Physical Planner and the report thereof was to be filed with the court within 30 days from the date of the Physical Planner's report. After completion of the survey exercise, the County Valuer was to carry out a valuation of each of the portions whether vacant or occupied, determining the value of each plot, and likewise file a report with the court within 30 days from the date of receiving the surveyor's report. The 2nd plaintiff has deposed that the survey of the suit land was done and approved by the Director of Surveys on September 9, 2021 and that the valuation subsequently done and finalized on October 6, 2021. Victor Otieno Olonde, the valuer incharge of Mombasa land's office, deposed on February 17, 2022 that he visited the suit land between 30th July to August 8, 2019 for the purpose of valuation. The 1st defendants' contention is that the physical planner's report, surveyor's report and the valuation's report have not been filed with the court as directed. From the foregoing, and noting that the said documents are not among those in the 2nd plaintiff's list of documents dated the February 8, 2022, it is therefore evident to the court that despite the said reports having been prepared by the respective officers, they were not filed with the court within the timelines directed or any other time thereafter.
- k. The timelines set out by court in the orders of October 31, 2019 were not cast in stone. The court takes judicial notice of the effects of Covid 19 pandemic on all government services during the period in question. The 2nd plaintiff is represented by counsel and definitely knew or ought to have known that it had the liberty of apply to the court for either extension of time to comply, or further directions or clarifications of the orders of court as per order number 12 of October 31, 2019, but did not do so. From the foregoing, the court finds that the 2nd plaintiff failed to comply with the orders of October 31, 2019 and their application dated the March 28, 2022 is premature and cannot be considered before compliance with the said court directions.



- l. On the plaintiffs' objection to the capacity of the deponent of the affidavit in support of the application dated the December 29, 2021 to represent the 1st defendant's, the requisite authority was annexed to the further affidavit sworn on the April 1, 2022. There being no further challenge presented to the explanation given therein by way of affidavit, the court takes the position that the question of the deponent's authority was fully settled. The 1st defendants should however ensure such documents, like other court documents, should always be served upon all other parties in the suit after being filed.
 - m. That in respect of the 1st defendants' application dated the February 17, 2022 to have the documents filed by the AG struck out and expunged from the record, the court finds the application to be premature in view of the findings above that the reports contemplated in the order of October 31, 2019 are yet to be filed with the court. Whatever documents the AG has filed are taken to be in respect of their case, and the court would be hesitant to allow a party cherry pick what documents are to be relied on by the other party without showing outright contravention with the Constitution 2010 or statutes like the Evidence Act, chapter 80 of the Laws of Kenya. That application is therefore without merit.
 - n. Due to the nature of these proceedings, the court is of the view that each party should bear their own costs in the three applications the provision of section 27 of the Civil Procedure Act chapter 21 of Laws of Kenya notwithstanding.
12. That for the reasons set out above, the court finds and orders as follows;
- a. The 1st defendants' application dated the February 17, 2022 has no merit is premature and is hereby struck out with each party bearing their own costs.
 - b. The 2nd plaintiff application dated the March 28, 2022 is also premature, without merit and is likewise struck out with each party bearing their own costs.
 - c. The 1st defendants' application dated the December 29, 2021 has merit and is allowed in the following terms;
 - i. That there should be no further dealing with the suit land and or the subdivisions thereof that is likely to affect its legal status, until the orders of October 31, 2019 are fully complied with. That for avoidance of doubts, the 2nd plaintiff is directed to file with the court all the reports as required in the orders of October 31, 2019 within thirty (30) days from the date of this ruling. The documents to be filed to include the following; The Enumeration Report, detailing the enumeration process that was conducted of the defendants/squatters residing on the suit land. Detailed List of the squatters who are not among the defendants, and who are to be considered for joinder that were identified in the enumeration to be occupying the suit property. The Physical Planner's Report on the suit land. The Survey Report on the suit land. The Valuation Report on each of the plots surveyed on the suit land.
 - ii. That the letters of offer issued by the 2nd plaintiff over all the plots subdivided from the suit property to any of defendants/squatters residing therein are hereby suspended, and the sale thereof stayed until further orders of the court, for the plaintiffs' failure to comply with the orders issued by this court on October 31, 2019.
 - iii. Each party to bear their own costs in the three applications.



Orders accordingly.

DATED AND VIRTUALLY DELIVERED THIS 5th DAY OF JULY 2023.

S. M. Kibunja, J.

ELC MOMBASA.

IN THE PRESENCE OF;

PLAINTIFFS : Absent

DEFENDANTS : Absent

3RD PARTY : Absent

COUNSEL : Mr Ned for 1st Plaintiff

Mr. Omondi for 2nd Plaintiff

Mr Penda for Makuto for 2nd Defendant

WILSON – COURT ASSISTANT.

S. M. KIBUNJA, J.

