



Kibira v Board of Management St. Teresa Secondary School & another (Environment & Land Case 25 of 2012) [2022] KEELC 2666 (KLR) (6 July 2022) (Ruling)

Neutral citation: [2022] KEELC 2666 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT & LAND CASE 25 OF 2012**

FO NYAGAKA, J

JULY 6, 2022

BETWEEN

JOSEPH WANYAMA KIBIRA PLAINTIFF

AND

**BOARD OF MANAGEMENT ST. TERESA SECONDARY
SCHOOL 1ST DEFENDANT**

HASSAN NDAMWE WAKOLI 2ND DEFENDANT

RULING

1. The 1st Defendant's Application dated January 26, 2022 and filed on February 3, 2022 invokes Section 3A of the *Civil Procedure Act*. It seeks the following reliefs:
 - (a) ...spent;
 - (b) That an order be issued directing the County Surveyor, Trans Nzoia County to reinstate the beacons demarcating Plot No. 61 Chepkorok Farm otherwise L. R. No. 5XXX/3 back to their original positions;
 - (c) That an (*sic*) be issued directing the County Police Commander, Trans Nzoia County and/or any other officer subordinate to him/her to provide security during the process of reinstating the beacons by the County Surveyor;
 - (d) That costs of the Application be provided for.
2. The Application was premised on the grounds on its face and supported by Affidavit of Justus Chatty Wafula, the Secretary of the 1st Defendant. According to the Applicant, prior to the institution of the present suit, the Plaintiff uprooted beacons demarcating the 1st Defendant's parcel of land namely Plot No. 61 Chepkorok Farm. In its judgment delivered on January 26, 2021, the Court dismissed the Plaintiff's suit and allowed the 1st Defendant's Counterclaim. The said judgments remain undisturbed.



This is after the Court dismissed the Plaintiff's bid to appeal out of time. A copy of the Ruling delivered on December 17, 2021 was annexed and marked JCW-1.

3. The 1st Defendant was desirous of developing its infrastructure which could not be undertaken unless boundaries were properly demarcated. It was further pointed out that the Plaintiff had previously disobeyed orders of the Court hence the need for security when the exercise would be conducted. Finally, the 1st Defendant deposed that it was in the interest of justice that the orders sought be granted.
4. In his Replying Affidavit filed on March 8, 2022, the Plaintiff deposed that he responded to the Application pursuant to issuance of a grant ad litem in Kitale CMC Ad Litem cause No. 25 of 2022. He annexed the petition and supporting Affidavit marked JWK (1) and (2). He maintained that the present Application was not founded on the Court's decision allowing the 1st Defendant's Counterclaim. For this proposition, he annexed JWK3, his statement of defence to Counterclaim. In the pleadings, the Plaintiff deposed, the County Surveyor enforced a decree issued on February 6, 1999 in Kitale CMC Land Case No. 12 of 1999 (JWK4) but such decree never authorized any person's being excised and given to the school. That the said decree has never been reviewed. Consequently, the Application is an affront to the said decree.
5. The Applicants further filed a Supplementary Affidavit on April 14, 2022. It was sworn on March 27, 2022 by Justus Chatty Wafula. He rehashed his deposition supporting the Application. Additionally, he deposed that the decree annexed JWK4, was properly implemented on July 27, 2011. He annexed and marked JCW-1A, JCW-1B and JCW-1C, letter from the Chief Magistrate Kitale, Decree and Order adopting the Elders' Award respectively. The implementation exercise was conducted in the presence of the Plaintiff and his brother. In support of the fact of implementation, the 1st Defendant produced and marked letters from the District Surveyors dated July 21, 2010 and March 19, 2012, Report by the District Surveyor dated March 19, 2012 and a portion of the Area Map marked, JCW-2A, JCW-2B, JCW-2C, and JCW-2D respectively. He maintained that it was after this exercise was conducted that the Plaintiff elected to file suit. He added that the issues raised in his Replying Affidavit are res judicata. As a result, the Plaintiff lacked locus standi. Finally, the letters of administration ad litem were a desperate attempt by the Plaintiff to circumvent final orders of the court.

Analysis And Disposition

6. Notwithstanding directions issued in terms of filing submissions, parties did not file submission as at the time of writing this Ruling. I have considered the Application and the rival parties' Affidavits. I have also scrutinized the Court's judgment delivered on February 11, 2021. I find that the parties herein have resorted to re-litigate the issues that were decided by the Court. Litigation must come to an end. I will therefore constrict myself to the issues for determination in the Application rather than placing myself in a manner as to be sitting on appeal against this Court's decision.
7. The 1st Defendant maintained that the reinstatement of the demarcation exercise to their original positions was necessitated by the fact that it intended to implement enormous infrastructure. Without the orders sought, that implementation cannot be conducted. In opposition, the Plaintiff deposed that the orders sought were baseless as they did not emanate from the trial court's decision delivered on February 11, 2021.
8. It is not disputed that the 1st Defendant owns the suit land. What is disputed is the reinstatement of the boundary demarcations. In answering the question for determination, I will import the trial court's judgment at paragraph 30. in part, as follows:

..... They (the Defendants emphasis mine) have also established by evidence of an expert, the County Surveyor who visited the suit to implement an order of the court in Kitale



CMCC Land Case No. 12 of 1999 that the 1st Defendant's school's plot is plot No. 61. It was evident from the record that the demarcation map that the former County Surveyor Bainito Ombudu Hussein (DW1), used the map that was in existence by the time he office on retirement, and that the evidence of his successor (PW3) which purported to contradict that position was weak and unsupported by any first-hand evidence of experience at the locus of the dispute. The beacons erected by the former County Surveyor on the ground in the exercise conducted to implement the court order in Kitale CMCC Land Case No. 12 of 1999 are the proper beacons demarcating the boundary between land owned by the school and the land occupied by the plaintiff fin the main suit.

9. As declared by this Court, in its wisdom, the beacons were erected in pursuance of the implantation of the Court Order in Kitale CM Land Case No. 12 of 1999; they remained the proper beacons demarcating the boundary. The 1st Defendant maintained that the Plaintiff uprooted those beacons. The Plaintiff, instead of addressing me on the same, submitted red herrings to avoid the real issue for determination. Suffice to add that he did not deny that he uprooted those beacons. The Court's decision arrived at on February 11, 2021 remains undisturbed. In any event it is suspicious and sinister as to why a party who is desirous of the truth and justice would oppose the process of replacing missing beacons. This Court reads mischief on his part. He may be wishing to leave the state of uncertainty to prevail so that if the other parties begin development on the land he rushes to Court with complaints and or other disputes. The Court wishes not to permit such a situation to occur.
10. In the upshot, I find that the Application dated January 26, 2022 is merited. Consequently, I make the following orders:
 - a The County Surveyor, Trans Nzoia County be and is hereby directed to reinstate the beacons demarcating Plot No. 61 Chepkorok Farm otherwise LR. No. 5XXX/3 back to their original positions.
 - b The County Police Commander, Trans Nzoia County and/or any other Officer subordinate to him/her is and is hereby directed to furnish security during the process of reinstating the beacons by the County Surveyor.
 - c Costs of the Application shall be borne by the Plaintiff.

Orders accordingly.

RULING DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 6TH DAY OF JULY, 2022.

DR.IUR FRED NYAGAKA

JUDGE, ELC, KITALE.

