



REPUBLIC OF KENYA



KENYA LAW
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**Mukhwana v Sawenja & another (Environment & Land Case
60 of 2019) [2022] KEELC 2704 (KLR) (12 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 2704 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT & LAND CASE 60 OF 2019
FO NYAGAKA, J
JULY 12, 2022**

BETWEEN

JACKTON SIUNDU MUKHWANA PLAINTIFF

AND

PROTUS SAWENJA 1ST DEFENDANT

JOHN WAKOLI SAWENJA 2ND DEFENDANT

RULING

1. Before me is the Plaintiff's Application dated 04/04/2022 filed on 20/04/2022. It is anchored on Section 5 of the *Judicature Act*, Sections 3A and 63 (c) of the *Civil Procedure Act* and Order 40 Rule 3 of the *Civil Procedure Rules*. It seeks the following reliefs:
 - (a) ...spent.
 - (b) ...spent.
 - (c) That the Defendants herein Protus Sawenja and John Wakoli Sawenja be committed to civil jail for a period of six months or such lesser period as the Honorable Court may deem fit to grant and/or the said Defendants be punished in such other lawful manner as the honorable court may deem expedient;
 - (d) That in the meantime the Honorable Court does order that the said Defendants have no right of audience before this Honorable Court unless they fully purge their contempt;
 - (e) That there be made such other and/or further orders as may be necessary and/or expedient in order to protect, preserve and uphold the authority and dignity of this court;
 - (f) That costs be in the cause.



2. The Application is supported by the grounds on its face of it and by Affidavit of the Plaintiff. The gravamen of the Application is that the Defendants are in violation of the Court Orders issued on 18/05/2020 (Order annexed JSM1) and affirmed on 04/09/2020 (Ruling and Order annexed JSM2A and JSM2B respectively). The said orders, bearing penal consequences, were served upon the Defendants as shown vide the copies of the Returns of Service marked JSM3A and JSM3B. The Plaintiff contended further that the Defendants have, in spite of being aware of the court orders, erected a permanent structure, interfered with the fences and boundaries and cleared and ploughed the land in readiness for planting. He produced photographs marked JSM4, JSM5 and JSM6A- 6D for this presupposition. Furthermore, the Plaintiff accused the Defendants of recording court sessions with a view to vilifying the Plaintiff to the public. He maintained that it was in the interest of justice that the orders be granted as prayed.
3. The Application was opposed vide the Defendants' joint Replying Affidavit on 09/05/2022. They deposed that the present Application was intent on defeating theirs dated 23/03/2022. As it stood, they maintained that they had not violated or disobeyed the court's orders. They explained that before the orders were granted, the Defendants had already deposited construction materials and immediately stopped on service of those orders. They produced photographs of the materials in evidence and marked them as PJ1. They further refuted that they were ploughing on the land as advanced by the Plaintiff.
4. They admitted that they had indeed ploughed on L.R. No. Kiminini/Kiminini Block 8 (Birunda Farm) 341 which parcel is not the subject of the present proceedings and annexed as PJ2 the photograph of the parcel of land. Additionally, they maintained that the house with blue iron sheets in the photo was on the said parcel and not on the suit land, contrary to the Plaintiff's advancements.
5. They denied interfering with the boundaries on the suit land. They annexed a photograph outlining the paddocking marked PJ3. They added that the coffee trees had not been cut down as alleged and purported to be shown in photographs annexed PJ4 (a) and (b). They further denied uprooting the water tank. They annexed photographs of the water tank marked PJ5 (a) and (b). They further denied taking recordings in court and put the Plaintiff to strict proof thereof. Finally, they accused the Plaintiff of misleading the court.
6. On 25/05/2022 the Court directed the physical attendance of the Defendants to shed light orally on the facts as alleged in the Application. The 1st Defendant testified on his behalf and that of the 2nd Defendant who too was in Court. He stated that both of them were aware of the Court orders and that they had not disobeyed them. Further, he stated that they did not live on the land and that the Plaintiff too did not live on it because by the time of the suit he had moved out of the same. They denied ploughing the land or even erecting structures on it. He admitted in cross-examination that there were people who lived on the parcel of land as their support staff, one of whom was Samson who has been in the house since 2017. The witness admitted in cross-examination to there being seedlings on the land but did not know who had planted them. He also stated there was napier grass on the land which he stated was an open space. He could not admit or deny that their animals could be grazed on the land. In re-examination he stated that whatever looked as fencing was paddocking of the land done earlier.

Submissions

7. The court directed that the Application be canvassed by way of written submission. As at the time of writing this Ruling, I was in receipt of only the Plaintiff's submissions filed twice on 26/04/2022 and 27/05/2022. They urged this court to allow the Application as prayed.



Analysis and Disposition

8. It is not in dispute that the court issued orders of injunction on 04/09/2020 restraining the Defendants from in any manner, interfering with the suit land. The Application is premised on the allegations that the Defendants have continued to violate and disobey these orders of the court. It was their disposition that the Defendants have ploughed, interfered with the fencing and constructed a structure with blue iron sheet roofing. In opposition, the Defendants denied the allegations raised by the Plaintiff. They denied ever having ploughed, interfered with the fencing or constructed permanent structures on the suit land.
9. I have analyzed the viva voce evidence of the 1st Defendant as well as the evidence in Affidavits. The Plaintiff maintained that the structure with a blue roofing was erected by the Defendants during the pendency of the suit. I note that no particulars were furnished in terms of the days and times these alleged constructions took place. Contra, the 1st Defendant, while admitting that the same structure, that is to say JSM4, was erected, maintained that it was erected in 2018 and not on the suit land but on another portion of land adjacent thereto.
10. Additionally, parties gave conflicting photographs perpetuating the current state of land. For instance, the Plaintiff stated that the Defendant had ploughed on the land. They furnished photographs in this regard. In rebutting these claims, the Defendants maintained that the said ploughing did take place in another parcel of land adjacent to the suit land. They added that the suit land had remained intact since issuance of the orders. They annexed photographs corroborating their evidence.
11. One of the allegations raised by the Plaintiff was that the water tank had been reconstructed. In support of this allegation was JSM5. Conversely, the Defendants maintained that the said water tank had never been interfered with and annexed PJ5 (a) and (b). If indeed this water tank was reconstructed as alluded to by the Plaintiff, one wonders why the Plaintiff never presented a comprehensive photograph demonstrating reconstruction. The view from that angle the photograph was taken demonstrates the existence of a water tank but the same was taken in such a wide angle that it would be difficult to ascertain reconstruction took place during the pendency of this suit. On the other hand, the Defendants produced a clear photograph of PJ5 (a) and (b). In my view, and based on those annexures, that tank has not been reconstructed.
12. Interestingly, while the Defendants vehemently refuted the Plaintiff's claims with supporting evidence, the Plaintiff elected not to respond to the Replying Affidavit by way of a Supplementary Affidavit. The Defendants further gave comprehensive explanations on the Plaintiff's Affidavit and annexures. They made a considerable response. To my mind, looking at all the above holistically, I find the Defendants' averments believable and navigating towards the truthfulness of the facts on ground.
13. It is clear that the present Application was only galvanized by the 1st Defendant's Application dated 23/03/2022 that seeks to call a witness to testify de bene esse. In their response, the Plaintiff accused the 1st Defendant of contempt but laid no basis for those claims. It is on the strength of those allegations that the present Application is before me. It is calculated to gain strength on the averments in the Replying Affidavit.
14. Indeed, the present Application was filed mala fides. I agree with the Defendants. It is intent on defeating the 1st Defendant's erstwhile Application. Consequently, the orders for granting are that the Application dated 04/04/2022 lacks merit and is hereby dismissed with costs to the Defendants.
15. The orders of dismissal of the Application dated 4/04/2022 notwithstanding, the Court directs that the orders of this Court be complied with in toto. First, the Defendants should not in any way interfere



with the suit land as ordered and that the servants and any other persons who claim through the Defendants in whatever manner who reside on the land and continue to use it should vacate therefrom forthwith in any event not later than the end of seven (7) days and should remove any structures or plants put on the suit land contrary to the Court order. This Order is given to serve as a last caution to either of the parties who may breach the directions of the Court. To be clear, the earlier orders of this Court remain in force.

Orders accordingly.

RULING DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 12TH DAY OF JULY, 2022.

DR. IUR FRED NYAGAKA

JUDGE, ELC, KITALE.

