



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAKURU**

**CASE No. 10 OF 2019**

**JOHN NDUNGU MWAURA**

**CHEPKONGA ARAP RUTO**

**ROBERT MWISANI on**

**behalf of themselves and 18 others.....PLAINTIFFS**

**VERSUS**

**MUNICIPAL COUNCIL OF NAKURU.....DEFENDANT**

**RULING**

1. This is a very old matter that was initially filed in the subordinate court as **SPMCC No. 1341 of 1994 (Nakuru)**. The subordinate court made the following order on 29<sup>th</sup> January 1997:

*1. THAT the defendant/respondent be and is hereby restrained by way of interlocutory injunction from interfering in any manner whatsoever with the plots on L. R. No. 6273 Road(s) of comprising and serving all the parcel of land commonly known as KALENJIN ENTERPRISES and/or BARUT FARM 113 which the plaintiffs are members pending the hearing and disposal of the main suit.*

*2. THAT costs of this application be borne by the respondents.*

2. The matter thereafter remained in the subordinate court for almost 23 years. On 11<sup>th</sup> January 2019, the plaintiffs filed **High Court Miscellaneous Application No. 316 of 2018 (Nakuru)** seeking transfer of the subordinate court matter to this court. The High Court allowed the application on 31<sup>st</sup> January 2019. It is not clear why the application was filed in the High Court and not this court. Upon transfer to this court, the subordinate court case was allocated the number ELC No. 10 of 2019.

3. The plaintiffs later filed Notice of Motion dated 11<sup>th</sup> October 2019, which is the subject of this ruling. The following orders are sought in the application:

*I. Spent*

*II. The OCPD Nakuru Central Police Station provides security and ensures compliance with the order of the Honourable Magistrate H. Owino (as she was there) (sic) dated 29<sup>th</sup> January 1997.*

*III. The costs of this application be above (sic) by the defendant/respondent.*

4. The application is supported by an affidavit sworn by Chepkonga Arap Ruto, one of the plaintiffs. He deposed that in blatant disregard of the order issued on 29<sup>th</sup> January 1997, the defendant has begun and continues to subdivide the suit property, an action which is contemptuous of the court.

5. The defendant responded to the application through a replying affidavit sworn by Stephen Waweru Njagi who works for the County Government of Nakuru as Senior Superintendent Water. He deposed that Kalenjin Enterprises surrendered some 56 acres of land which later became known as Nakuru Municipality Block 29/1201 to the defunct Municipal Council of Nakuru to be used for sewerage works and that the said property is currently under the management of Nakuru Water and Sanitation Company Limited (NAWASSCO) which is a corporate entity vested with management of sewerage works. He added that there is no land bearing the number L. R. No. 6273 as it was subdivided and titles issued. He added that a site visit to the land on 27<sup>th</sup> November 2019 revealed that it is the members of Kalenjin Enterprises now

known as Rift Valley Enterprises who are subdividing the land, cultivating and even constructing on it.

6. Parties relied entirely on the material on record and urged the court to render a ruling. I have carefully considered the application and the affidavits filed. The orders referred to were made by the subordinate court way back on 29<sup>th</sup> January 1997. It is not clear what the plaintiffs did to obtain compliance with the orders while the matter was pending in the subordinate court. While it is clear that court orders must be obeyed, I find it difficult to ascertain the scope of the order and any non-compliance or disobedience of it over 22 years after it was made. The defendant has also demonstrated that the property is currently under the management of Nakuru Water and Sanitation Company Limited (NAWASSCO) which is a corporate entity. The applicants have not contested this. Further, the applicants have not demonstrated that the order was served on NAWASSCO.

7. I further note that the present application seeks police assistance to enforce compliance with the order. It has lately become fashionable for litigants to routinely seek police assistance in purely civil matters which are fully addressed by the Civil Procedure Act and rules made thereunder. That is unacceptable. Unless there are proven special circumstances such as threat to life or property which cannot be secured by enforcing court orders through the usual procedures such as citing contemnors for punishment, civil proceedings should be kept purely civil. That is particularly so as regards injunctive orders which have ample provisions for enforcement under the Civil Procedure Act and rules. I am not alone in this thinking. Hancox CJ stated as follows in **Kamau Mucuha v Ripples Ltd [1993] eKLR**:

***Before concluding this judgment I would refer to paragraph 4 of the formal order extracted on 22<sup>nd</sup> September 1992. It says that police assistance may be enlisted to ensure that the plaintiff (ie the respondent) is reinstated in the premises. I have not been able to find any such order in Mwera J's ruling, but it would, in any event be unlawful to utilize the police in a civil action for the purpose of effecting or aiding private evictions or reinstatements. ...***

8. Later in the same judgment, Kwach JA echoed those sentiments as follows:

***The only valid criticism of the order of the judge which I can see as of now, but which does not swing the scale one way or the other in this application, is the direction that the assistance of the police should be enlisted to secure compliance by the applicant. The police should never be involved in such matters as there is specific provision for the enforcement of an injunction under order 21 rule 28 of the Civil Procedure Rules.***

9. In view of the foregoing and the ambiguities cited above, I am not persuaded that the orders sought should issue. The orders of 29<sup>th</sup> January 1997 were made “*pending the hearing and disposal of the main suit*”. It is unacceptable that the suit remains pending 25 years after it was filed in court. The plaintiffs should prosecute the suit so as to bring the matter to an end. In that regard, I note that the suit herein is scheduled for hearing on 3<sup>rd</sup> February 2020. Parties should focus on ensuring that the hearing proceeds on that date.

10. In view of the foregoing, I find no merit in Notice of Motion dated 11<sup>th</sup> October 2019 and dismiss it with costs to the defendant.

11. It is so ordered.

**Dated, signed and delivered in open court at Nakuru this 18<sup>th</sup> day of December 2019.**

**D. O. OHUNGO**

**JUDGE**

In the presence of:

Mr Lumadede (the plaintiff/applicant) present in person

Ms Litunda for the defendant/respondent

Court Assistants: Beatrice & Lotkomoi