



Andai & another v Ojera & another (Environment & Land Case 3 of 2020) [2024] KEELC 1241 (KLR) (7 March 2024) (Ruling)

Neutral citation: [2024] KEELC 1241 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA

ENVIRONMENT & LAND CASE 3 OF 2020

EC CHERONO, J

MARCH 7, 2024

IN THE MATTER OF LAND PARCE NO E. BUKUSU/S.KANDUYI/18770

AND

IN THE MATTER OF SECTION 17,18,37 &38 OF THE LIMITATION OF ACTIONS ACT

AND

IN THE MATTER OF ADVERSE POSSESSION.

BETWEEN

ELIZABETH AMUKHUMA ANDAI 1ST APPLICANT

MARTIN OWIRA OJERA 2ND APPLICANT

AND

TABITHA OSIEKA OJERA 1ST DEFENDANT

FELIX WANGILA KOPILO 2ND DEFENDANT

RULING

*****ARGUMENTS**

1. By Notice of Motion dated 10th August, 2023 the Applicant sought for the following orders: -
 - a. That this honourable court be pleased to find that the 1st and 2nd contemnors are in contempt of the orders of this court made on the 17th March, 2022.
 - b. That the contemnors be summoned to attend this honorable court to show cause why they should not be committed to civil jail for being in contempt of the court order made on 17th March, 2022 by forcefully re-entering into 0.37Ha of land comprised in E.Bukusu/S.Kanduyi/18770 despite the knowledge of the existence of the court order on the contrary.



- c. That in default of order 2 above, warrants of arrest do issue against the 1st and 2nd contemnors and same be implemented by the officer in Charge Bungoma Police station.
 - d. Costs of this application be provided for.
2. The application is based on the grounds on the face thereof and the Supporting Affidavit sworn on 10th August 2023. The applicant stated that the contemnors sued her before the trial court for orders that they had acquired the suit land through adverse possession. On her part, she filed a counterclaim praying to have the contemnors herein evicted from the suit land and a permanent injunction issued against them from in any way dealing with Land parcel no.- E.BUKUSU/S.KANDUYI/18770('the suit land').
3. It is further stated that the applicant offered to settle this matter out of court by awarding the contemnors a plot measuring 50*100 which offer was declined and the matter proceeded for full hearing. The trial court upon hearing both parties, this Honourable court made its findings in favour of the applicant as against the contemnors and the plaintiff was issued with security order to evict them from the suit land. The applicant stated that unknown to her, the contemnors re-entered the suit land and erected structures thereon.
4. It is averred that the contemnors preferred an appeal but the same was never followed upon and as a such, the orders issued on 17th March, 2022 remain valid. The applicant therefore asked the court to find the contemnors culpable.
5. The application is opposed with a replying affidavit sworn by the 1st contemnor on 31st October, 2023. The respondents contend that the application was bad in law and contravenes the provisions of Order 2 Rule 6 of the Civil Procedure Rules since it had not been signed. It was averred that the one David Odhiambo Ojera who died in 2014 and was the 1st contemnors husband was buried in the suit land. It was further stated that upon the death of her husband, she continued to live on the suit land. The 1st contemnor contends that the land was acquired by her father-in-law from the 2nd defendant but the applicant who is her husbands' step-mother is the proprietor of the suit land but she holds the same in trust.
6. The respondent averred that the applicant acquired the suit land fraudulently to the exclusion of other beneficiaries. The 1st respondent blamed his previous counsel for acting without instructions by instituting the claim and basing it on adverse possession as they only sought to acquire a share of the estate as beneficiaries of the estate of the late James Ochilo Ojera. The 1st respondent denied knowledge of the alleged proposal to grant them a 50*100 Feet plot but stated that the land they currently occupy is measuring 50*100 Feet where her husband has been buried.
7. The respondent stated that the applicant has gone against the consent by seeking to forcefully eject them. Lastly, respondents contend that the applicant seeks to mislead the court as she had not sufficiently explained how she obtained title to the suit land.
8. Upon consideration of the Notice of motion application dated the 10th August, 2023 the supporting affidavit as well as the replying affidavit, following are the issues for determination:
 - a. Whether the notice of motion has been lodged in breach or Order 2 Rule 6 of the Civil Procedure Rules.
 - b. Whether the respondents are in contempt of the eviction court order dated 17th March 2022.
 - c. Whether the defendant is entitled to the orders sought.



9. The Black's Law Dictionary (Ninth Edition) defines contempt of court as "Conduct that defies the authority or dignity of a court. Because such conduct interferes with the administration of justice, it is punishable usually by fine or imprisonment"
10. The *Contempt of Court Act*, No. 46 of 2016 in Section 4 (later declared unconstitutional) provided as follows: Contempt of Court includes:
 - (a) Civil contempt which means willful disobedience of any judgment, decree, direction, order or other process of a court or willful breach of an undertaking given to a court.
11. It is not in contention that this is a matter which was heard and determined on merit by this honourable court and judgment delivered on 17th March, 2022. In brief the substance of this matter is that ELIZABETH AMUKHUMA ANDAI and MARTIN OWIRA OJERA (the 1st and 2nd Respondents respectively) moved to this Court vide their amended Originating Summons dated 14th February 2020 in which they impleaded TABITHA OTSIEKA OJERA and FELIX WANGILA LOPILO (the 1st Applicant and 2nd defendant respectively) seeking a determination that they had acquired land parcel NO EAST BUKUSU/SOUTH KANDUYI/18770 (the suit land) by operation of law through the doctrine of adverse possession and that the title held by the 1st defendant has been extinguished by operation of the law.
12. The Applicant on the other counterclaimed and sought for orders that the respondent be evicted from the suit land, remove the caution and be also permanently injuncted together with their relatives, agents, workers, assignees or employees from trespassing on the suit land. It was her case that although she is the registered proprietor of the suit land, the respondents had in August 2019 trespassed thereon without any colour of right and purported to build a temporary house without her permission.
13. The court in its determination issued the following orders;
 - i. The plaintiffs' suit is dismissed.
 - ii. Judgment is entered for the 1st defendant as pleaded in her Counter – Claim as follows: -
 - a. The plaintiffs, their agents, servants, assignees, relatives or any persons claiming through them shall vacate the land parcel NO EAST BUKUSU/SOUTH KANDUYI/18770 within three (3) months from the date of delivery of this Judgment or they be evicted therefrom in accordance with the law.
 - (b) Thereafter, the plaintiffs, their agents, servants, assignees, relatives or any other persons claiming through them shall remain permanently restrained from entering, trespassing, constructing ploughing or in any other way interfering with the 1st defendant's possession, ownership and occupation of the land parcel No East Bukusu/ South Kanduyi/18770.
 - (c) The restriction placed on the land parcel No East Bukusu/South Kanduyi/18770 by the plaintiffs is removed forthwith.
 - iii. The suit against the 2nd defendant is struck out with no orders as to costs.
14. The applicant herein now claims that the respondents have re-entered the suit land and constructed semi-permanent structures. In support of the application, she has attached photos of the alleged structures. The respondents have not denied this allegation but instead allege they are on the suit land with permission of the defendant.



15. On the first issue, the respondents in opposition to the application argue that the applicant presented unsigned pleading and as such the same were lodged in contravention of the provisions of Order 2 Rule 16 of the Civil Procedure Code.

Order 2, Rule 16 of the Civil Procedure Rules, provides as follows:

“Every pleading shall be signed by an advocate, or recognized agent (as defined by Order 9, rule 2), or by the party if he sues or defends in person.” (Emphasis mine)

16. For avoidance of doubt, I have perused the Notice of Motion dated 10th August, 2023 and find that indeed the same is unsigned. The drafters of this provision of law is couched it in mandatory terms with the intent to ensure that there is ownership of the contents of pleadings either by an advocate, a recognized agent or the party to the suit. Pleadings are the bedrock of any claim brought before a court for determination.

17. In my view, an unsigned pleading is a substantive issue that goes to the root of the pleadings and, cannot be cured by the “oxygen principle” or Article 159 (2) (d) of *the Constitution*. The Superior courts have held on numerous decisions that unsigned pleadings are a nullity. In Regina Kavenya Mutuku & 3 Others vs. United Insurance Company Limited Nairobi (Milimani) HCCC No. 1994 of 2000 [2002] 1 KLR 250, Justice A. Ringera stated;

“An unsigned pleading has no validity in law as it is the signature of the appropriate person on the pleading which authenticates the same and an unauthenticated document is not a pleading of anybody. It is a nullity”.

18. Further, in the case of Vipin Maganlal Shah & another v Investment & Mortgages Bank Limited & 2 others [2001] eKLR the Court of Appeal was of the following view: -

“...If a plaint is not signed either by the plaintiff in person or his recognized agent or his advocate, what is the use of requiring that it contains an averment by the plaintiff that there is no other suit pending and so on? If the plaint is not signed as required by Order VI rule 14, these other requirements clearly become meaningless. Whatever may be the position in India or even in England, the position in Kenya seems to us to be that a party who files an unsigned plaint runs a very grave risk of having that plaint struck out as not complying with the law...”

19. Similarly, in the case of Regina Kavenya Mutuku & 3 others v United Insurance Co Ltd [2002] eKLR the court held as follows on unsigned pleadings:

“... I am in agreement ... that an unsigned pleading cannot be valid in law. To my mind, it is the signature of the appropriate person on a pleading which authenticates the same... An unauthenticated document is not a pleading of anybody. It is a nullity. In my opinion where a pleading has been amended and the same has been struck out for whatever reason, the party affected has simply no valid pleading left on record... I find that the defendant has no valid defence on record.”



20. Consequently, it is my finding that the plaintiff's unsigned Notice of Motion is a nullity and there is nothing to adjudicate upon. In *John Onger Mariaria & 2 Others Vs. Paul Matundura* Civil Application No. Nai. 301 of 2003 [2004] 2 EA 163 it was held that;

“Legal business can no longer be handled in such sloppy and careless manner. Some clients must learn at their costs that the consequences of careless and leisurely approach to work by the advocates must fall on their shoulders..Whenever a solicitor by his inexcusable delay deprives a client of his cause of action, his client can claim damages against him...Whereas it is true that the Court has unfettered, like all judicial discretion must be exercised upon reason not capriciously or sympathy alone...Justice must look both ways as the rules of procedure are meant to regulate administration of justice and they are not meant to assist the indolent”

21. From the foregoing disposition, I see no need to discuss the other issues as set out.

22. In the end, the Notice of Motion dated 10th August,2023 is struck out with costs to the plaintiffs.

DATED, SIGNED AND DELIVERD AT BUNGOMA THIS 7TH DAY OF MARCH, 2024.

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HON.E.C CHERONO

ELC JUDGE

In the presence of;

1. Mr. Anwar H/B Simiyu for applicant
2. Respondent in person-present.
3. Bett C/A

