



Nyakinyua Ndorua Kanini Kega Farmers Company v Kariuki & 2 others (Sued as the administrators of the Estate of the late Josiah Mwangi Kariuki) (Environmental and Land Originating Summons 1 of 2023) [2024] KEELC 3941 (KLR) (25 April 2024) (Ruling)

Neutral citation: [2024] KEELC 3941 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYANDARUA
ENVIRONMENTAL AND LAND ORIGINATING SUMMONS 1 OF 2023**

YM ANGIMA, J

APRIL 25, 2024

(FORMALLY NYAHURURU ELCOS NO. E014 OF 2022)

**IN THE MATTER OF RIVERSIDE FARMS
OLKALOU LR. NO. 3777/115, 3777/204 & 3777/273**

BETWEEN

NYAKINYUA NDORUA KANINI KEGA FARMERS COMPANY PLAINTIFF

AND

DORIS NYAMBURA KARIUKI 1ST DEFENDANT

TERRY WANJIRU KARIUKI 2ND DEFENDANT

MARK KARIUKI MWANGI 3RD DEFENDANT

**SUED AS THE ADMINISTRATORS OF THE ESTATE OF THE LATE JOSIAH
MWANGI KARIUKI**

RULING

1. Vide a notice of motion dated 07.08.2023 expressed to be based upon Order 40 rule 3(1) & (3) of the Civil Procedure Rules, 2010, Section 5 of the Judicature Act (Cap.8), and all enabling provisions of the law, the 2nd and 3rd Defendants (the Defendants) sought, inter alia, an order citing the Plaintiff for contempt of court for disobeying the orders made by this court on 01.03.2023, 13.03.2023 and 23.05.2023 and for the Plaintiff's officials to be jailed for 6 months. The Defendants also sought an order the demolition of the structures erected by the Plaintiff's members in violation of the said order.
2. The application was based upon the grounds set out in the body of the motion and the contents of the supporting affidavit sworn by Terry Wanjiru Kariuki on 07.08.2023 and the annexures thereto. It was contended that although the subject orders were made in the presence of the Plaintiff's advocates on



record, the Plaintiff's members had undertaken construction of new buildings and taken occupation of additional portions of the suit properties. It was contended that the Plaintiff was fully aware of the court orders and that their violation was deliberate, intentional and meant to prejudice the Defendants' rights. It was the Defendants' case that such disobedience was degrading the dignity and integrity of the court hence the Plaintiff ought to be punished accordingly.

3. The Plaintiff filed a replying affidavit sworn by Martha Wanjiku Macharia on 14.12.2023 in opposition to the application. She deposed that she was the chairperson of the Plaintiff and conceded that she was aware of the interim orders the subject of the application. She, however, contended that the status quo orders allowed the Plaintiff's members to continue occupying the suit properties and to renovate existing buildings. The Plaintiff denied that any new buildings were being constructed and contended that what was being done was merely renovation of existing buildings which were constructed over a period of 50 years. It was the Plaintiff's case that the Defendants were the ones who had violated the interim orders by seeking to drill a borehole on the suit properties. As a result, the Plaintiff contended that the Defendants had failed to prove the contempt alleged against them.
4. When the application was listed for directions it was directed that the same shall be canvassed through written submissions. The parties were consequently granted timelines within which to file and exchange their respective submissions. The record shows that the 2nd and 3rd Defendants filed submissions dated 19.01.2024 whereas the Plaintiff's submissions were not on record by the time of preparation of the ruling.
5. The court has considered the notice of motion dated 07.08.2023, the replying affidavit in opposition thereto as well as the material on record. The court is of the opinion that the following are the key issues for determination:
 - a. Whether the Defendants have proved the contempt alleged against the Plaintiff.
 - b. Whether an order should issue for demolition of the offending structures.
 - c. Who shall bear costs of the application.

a. Whether the Defendants have proved the contempt alleged against the Plaintiff

6. The court has considered the material and submissions on the first issue. The standard of proof in contempt of court proceedings was summarized in the case of Mutitika -vs- Baharini Farm Limited [1985] KLR 229 where the Court of Appeal held, inter alia, that:

“In our view, the standard of proof in contempt proceedings must be higher than proof on the balance of probabilities, almost but not exactly, beyond reasonable doubt... The standard of proof beyond reasonable doubt ought to be left where it belongs, to wit, in criminal cases. It is not safe to extend it to an offence which can be said to be quasi-criminal in nature.”

7. It is evident from the material on record that the interim orders first made on 01.03.2023 were made in the presence of the Plaintiff's advocates. The said order stipulated as follows:

“The status quo obtaining as at today shall be maintained until the next mention date. In particular, the Plaintiffs and their members shall not construct any new buildings or structures until the next date.”

8. The record shows that those interim orders were extended on subsequent occasions such as on 13.03.2023 and 30.05.2023. The Plaintiff has denied that its members have occupied new areas of the



suit properties and has maintained that what their members occupy is what they have always occupied since 1973. The Plaintiff has also contended that the photographs produced by the Defendants do not depict any new construction but merely renovation of existing buildings some of which have been in existence for 50 years.

9. The court finds that on the contradicting affidavit evidence on record there is no convincing evidence to demonstrate that the Plaintiff's members have occupied new areas or portions of the suit properties. There is no report from a surveyor or other expert to demonstrate what areas the Plaintiff's members occupied prior to the issuance of the interim orders vis-à-vis the areas they have occupied after issuance of the interim orders. As a result, the court is not satisfied that the Defendants have demonstrated to the required standard that the Plaintiff and its members have occupied new portions or areas of the suit properties.
10. The court is, however, unable to agree that the Plaintiff's members have not undertaken construction of new buildings and structures on the suit properties. The court does not agree that the Plaintiff's members were merely undertaking renovations to buildings which were constructed a long time ago. It is very clear from the photographic evidence exhibited by the Defendants that some of the buildings under construction are entirely new. One of the photographs depicts some workmen on the 1st floor level trying to fix shutters. Such construction cannot, by any stretch of imagination, be said to constitute mere renovations of an existing building. The court is satisfied that some of the Plaintiff's members are constructing new structures in violation of the interim orders prohibiting such construction. The court is further satisfied that the said actions were deliberate and wilful and without any lawful justification or excuse. As a consequence, the court finds the Plaintiff guilty of contempt of the interim order relating to construction of new buildings and structures.

b. Whether an order should issue for demolition of the offending structures

11. Although the court has found that the Plaintiff and its members were in violation of the interim orders prohibiting construction of new buildings or structures the court is not inclined to order demolition at the interim stage and before the hearing of the main suit. The court is of the opinion that such an order should be considered at the conclusion of the suit. The court is also not inclined to order demolition at this stage because all the new structures on the suit properties have not been mapped and identified so that there might be a danger of some of the older and incomplete buildings being demolished at the interim stage.

c. Who shall bear costs of the application

12. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to Section 27 of the *Civil Procedure Act* (Cap 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See *Hussein Janmohamed & Sons –vs- Twentsche Overseas Trading Co. Ltd* [1967] EA 287. The court finds no good reason to depart from the general rule. As a result, the 2nd and 3rd Defendants shall be awarded costs of the application.
13. The upshot of the foregoing is that the court finds and holds that the contempt alleged against the Plaintiff regarding construction of new buildings and structures has been proved to the required standard. However, the contempt alleged with respect to occupation of new portions or areas of the suit properties has not been proved to the required standard. As a consequence, the court makes the following orders for disposal of the notice of motion dated 07.08.2023:



- a. The Plaintiff is hereby found guilty and convicted of contempt of court for violation of the interim orders prohibiting construction of new buildings or structures made on 01.03.2023, 13.03.2023 and 23.05.2023.
- b. The Plaintiff is hereby fined a sum of Kshs.500,000/= (five hundred thousand only) for contempt of court and in default of payment the Plaintiff's property shall be attached and sold to recover the amount.
- c. The prayer for demolition of the offending structures is hereby declined.
- d. The 2nd and 3rd Defendants are hereby awarded costs of the suit to be borne by the Plaintiff.

It is so ordered.

RULING DATED AND SIGNED AT NYANDARUA THIS 25TH DAY OF APRIL, 2024 AND DELIVERED VIA MICROSOFT TEAMS PLATFORM.

In the presence of:

Ms. Wangechi for the Plaintiff

N/A for the 1st Defendant

Ms. Wangari for the 2nd & 3rd Defendants

C/A - Carol

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Y. M. ANGIMA

JUDGE

