



Kiraga v Bryant & 4 others (Environment & Land Petition E009 of 2022) [2024] KEELC 5630 (KLR) (23 July 2024) (Ruling)

Neutral citation: [2024] KEELC 5630 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND PETITION E009 OF 2022
NA MATHEKA, J
JULY 23, 2024**

BETWEEN

ANDERSON KIRAGA PETITIONER

AND

WENDY BRYANT 1ST RESPONDENT

LEAH BRYANT 2ND RESPONDENT

REGISTRAR OF TITLES MOMBASA 3RD RESPONDENT

NATIONAL LAND COMMISSION 4TH RESPONDENT

THE HONOURABLE ATTORNEY GENERAL 5TH RESPONDENT

RULING

1. The application is dated 16th October 2023 and is brought under Sections 1A and 3.34 of the [Civil Procedure Act](#) (Cap 21) Section 5 of the [Judicature Act](#), Orders 40 Rules 1, 3 and 4(1), and Order 51 Rule 1 of the [Civil Procedure Rules](#) 2010 seeking the following orders;
 1. That Application be certified as extremely urgent and be heard ex-parte in the first instance.
 2. That the Honourable Court be pleased to lift the Corporate veil of incorporation of Barnsbury Investments Limited and join to this suit Timothy Bryant, Aman Kurji, Rishma Kurji And Barnsbury Investments Limited as the Respondents respectively.
 3. That this Honourable Court be pleased to direct the Chief Land Registrar of Mombasa to cancel and/or revoke the transfer registered on 23rd August 2023 in respect to 6 acres of the parcel of land known as CR.No.40989 (hereinafter referred to "the suit property") pending the hearing and determination of this application and main petition.



4. That this Honourable court be pleased to grant leave to the Petitioner/Applicant to Amend it is Petition and file additional documentation in its support thereof in light of emerging circumstances.
 5. That this Honourable Court be pleased to summon the 1st, 2nd and 3rd Respondents (Wendy Bryant, Leah Bryant and Registrar Of Titles Mombasa) and the intended/ Respondents (Timothy Bryant, Aman Kurji and Rishma Kurji) to all appear personally in physical court and show cause why they should not be punished for contempt of Court Orders.
 6. That this Honourable Court be pleased to commit the 1st and 2nd Respondent (Wendy Bryant and Leah Bryant), the intended Respondent (Timothy Bryant, Aman Kurji and Rishma Kurji) to civil jail for six (6) months or for such other period as the court may deem fit.
 7. That the County Police Commander-Mombasa and County Commissioner-Mombasa to maintain peace on the suit property as per the orders granted for status quo.
 8. That The costs of this application be borne by the Respondents and the intended interested parties/Respondents.
 9. That This Honourable Court be pleased to make any other or further order as the justice of the case may demand.
2. According to the grounds and the supporting affidavit sworn by the Petitioner he stated that the reasons for seeking the above are that on 12th October 2022 the Honourable Court issued orders directing the status quo be maintained on the suit property and that the respondents and the intended respondents entered into a sale agreement and constructions commenced on the suit property; that although the intended respondents were not part of the proceedings at commencement they were informed later by the Respondents about the status quo but went ahead to start construction on the suit property; that the petitioners advocates quickly went to the suit property and served them with the said order which were completely ignored; that the said advocates reported to the OCS Bamburi Police Station and also served the said order but he declined to take any action; that the Respondents are using forged court orders dated 9th June 2022 to evict the applicants.
 3. The 2nd respondent swore a replying affidavit on 24th November 2023 stating that the application is not proper as it seeks orders against Barnsbury Investments and the Chief Land Registrar who are not parties to this suit; that the said status quo order lapsed on 14th November 2022 as it was not extended by the court and even on subsequent mentions until 16th October 2023 the status quo was not extended; that the petitioner had previously sought conservatory orders through an application dated 3rd March and the court gave status quo orders on 21st June 2022 which stopped the eviction of the plaintiffs herein; that on 31st June 2022 there was no single squatters and that there are no other squatters on the suit property and she referred the court to her affidavit sworn on 6th June 2022. That the application is an abuse of the court process as the petitioner filed an earlier application for contempt of court on 11th November 2022 and that the requirements for contempt have not been met. There is also a grounds of opposition by the 2nd respondent dated 14th May 2024 which the court will not consider as it speaks to a non-existent application dated 26th April 2024.
 4. The 1st respondent also filed a replying affidavit sworn on 15th November 2023 and she reiterated as the 2nd respondent above that there is no status quo order as it lapsed on 14th November 2022. That in the absence of such order there can be no contempt; that the petitioner made a similar application dated 11th November 2022. That the instant application is an abuse of the court process; that seeking to have orders against intended respondents and intended interested parties is a backdoor approach



which the court should not entertain as it they should have been joined first. The rest of the parties did not respond.

5. Counsel for the petitioner and the 2nd respondent filed their submissions and the court has carefully considered the application, the replies and rival submissions and has found that the issue for determination is whether the application has merit or not?
6. All the orders seek orders against either intended respondents or intended interested parties. It is most obvious that they did not put responses as they have not been joined as parties according to Order 1 Rule 10 *Civil Procedure Rules*. I concur with submissions from the respondents that the court cannot issue substantive orders against parties who are not part to this suit.
7. Article 50 of the *Constitution* states that a party must be accorded a right to fair hearing which is tandem with the audi alteram partem cardinal principle of law which provides that parties must be given an opportunity to be heard before adverse orders can be made against them. The Court of Appeal had an opportunity to elucidate on this principle in the case of *Pashito Holdings Limited & Another vs Paul Nderitu Ndungu & 2 Others* [1197] eKLR when it stated;

The rule of "audi alteram partem", which literally means hear the other side, is a rule of natural justice. According to Jowitts Dictionary of English Law (2nd Edition)"It is an indispensable requirement of justice that the party who had to decide shall hear both sides, giving each an opportunity of hearing what is urged against him". There is an unpronounceable Latin maxim which in simple English means: "He who shall decide anything without the other side having been heard, although he may have said what is right, will not have done what is right."

8. In the case *Kiai Mbaki & 2 others vs Gichubi Macharia & another* (2005) eKLR the court stated as follows;

The right to be heard is a valued right. It would offend all notions of justice if the rights of a party were to be prejudiced or affected without the party being afforded an opportunity to be heard."

9. It follows that the court cannot issue orders against a person that is not a party to the suit. I find that this application lacks merit and I dismiss it with costs.
10. It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 23RD DAY OF JULY 2024.

N.A. MATHEKA

JUDGE

