



Nyambu & 4 others (Representing over 300 Residents Residing on Land Parcel No. MN/11/277, MN/11/276, MN/11/231 and MN/11/27)) v Khimji (Environment and Land Civil Miscellaneous Application 9 of 2021) [2024] KEELC 6071 (KLR) (25 September 2024) (Ruling)

Neutral citation: [2024] KEELC 6071 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND CIVIL MISCELLANEOUS APPLICATION 9 OF 2021
SM KIBUNJA, J
SEPTEMBER 25, 2024

BETWEEN

SAFARI CHENGO NYAMBU 1ST APPLICANT
NZINGO KATANA GONA 2ND APPLICANT
MASHA JOHN GONA 3RD APPLICANT
KATANA KAHINDI NG'AMBO 4TH APPLICANT
FLORENCE MALEMBA MWAZIGHE 5TH APPLICANT
REPRESENTING OVER 300 RESIDENTS RESIDING ON LAND PARCEL NO.
MN/11/277, MN/11/276, MN/11/231 AND MN/11/27)

AND

ALPHESH KHIMJI RESPONDENT

(Representing over 300 Residents residing on land parcel No. MN/II/277, MN/II/271, MN/II/276, MN/II/231 and MN/II/27)

RULING

[Notice Of Motion Dated 19th March 2024]

1. The respondent filed the notice of motion dated 19th March 2024 seeking for orders “that the OCS of Bamburi Police station in conjunction with Officer Commanding Kiembeni Police station do enforce compliance with the notice to vacate issued on 8th February 2023” and costs. The application is based on the twelve (12) grounds on its face and supported by the affidavit of Alpeh Kanaknih Khimji, the respondent, sworn on the 19th March 2024, deposing inter alia that the court delivered a ruling on 21st April 2022 dismissing the applicants’ suit for adverse possession in respect of the respondent’s



parcels of land L.R. MN/II/231, 271, 276, 277 and 278, suit properties; that the respondent, in the spirit of section 152 E of the Land Act Cap 280 published a 3 months' notice to vacate in the Daily Nation on 8th February 2023, and also served the applicants with a notice to vacate as required under the above section, as well as regulation 65 and 67 of the Land Regulations; that despite the lapse of all the above notices, the applicants have been hostile and violent when attempts at eviction are made, and that the same will most likely continue trespassing, occupying, erecting structures and encroachment of the suit properties.

2. The application is opposed by the applicants through the replying affidavit of Nzingo Katana Gona, the 2nd applicant, sworn on 9th May 2024, in which he inter alia deposed that there are over three hundred people who have been residents on the suit properties for over 20 years; that their application was dismissed for the reason that the original title was closed, and new titles were issued on subdivision, and hence this application cannot be allowed on non-existing parcels; that the original title documents relied on by the respondent are closed, and are not conclusive evidence of ownership of plot 15782-16150; that the ruling of 21st April 2022 only dismissed the suit, but did not declare the respondent as the owner; that the notices to vacate were not in regard to subdivisions 15782-16150; that the respondent cannot evict the applicants on the above parcels as the owners have not been ascertained; that the applicants are currently conducting searches on 278 parcels of land with the intention to institute a new suit against the respondent; that they have never been violent, and the respondent has never produced an OB entry as proof; that the respondent has never produced title for the subdivisions to prove that he is the registered owner; that if the application is allowed, it will affect social amenities like churches, mosques, schools and other social activities which will be impacted.
3. The respondent filed a further affidavit sworn on the 20th May 2024 deposing among others that there is no dispute that he was the registered owner of the parcels numbers 15782 to 16150, Kiembeni, Mombasa; that no objection was raised to the notices dated 8th February 2023, that had captured the correct parcels and parties.
4. The learned counsel for the respondent and applicants filed their submission dated 20th May 2024 and 13th May 2024 respectively, that the court has considered.
5. The issues for determinations by the court are as follows:
 - a. Whether the respondent has made a reasonable case for an order directing the two Officer Commanding Stations named to enforce the compliance of notice to vacate from the suit properties dated 8th February 2023.
 - b. Who pays the costs?
6. The court has after considering the grounds on the application, affidavit evidence by the parties, submissions by learned counsel, superior court decisions cited thereon come to the following determinations:
 - a. The ruling dated 21st April 2022 by Hon. Munyao J. was based on an application by the respondent based on the fact that the suit properties do not exist, as they were consolidated into one title and later subdivided into 278 plots, and thus the applicants had no legal right to seek adverse possession on non-existent titles. It is true that the suit was dismissed, at a preliminary stage and that the merits of the case was not decided. Nevertheless, there is an order by this court striking out the applicants' adverse possession claim over the suit properties, which has the effect of finality, as it has not been reviewed, and or successfully appealed against. Vide the said ruling of 21st April 2022, upholding the respondent's application dated the 5th February



2021, the court rendered itself by striking out the applicants' originating summons on finding that the suit properties were non-existent.

- b. The enforcement of the notice dated 28th July 2023 and newspaper notice dated 8th February 2023 are over new titles to wit L.R 15872-16150/II/MN. Clearly, those are titles to parcels of land that are different from subject matter of the suit. This suit cannot be used for the purpose of issuing enforcement orders in respect of properties that are strange to those dealt with under the ruling of 21st April 2022. The respondent should consider moving the court through a fresh claim for the desired orders. The court therefore finds no merit with the instant application.
- c. Section 27 of the *Civil Procedure Act* Chapter 21 of Laws of Kenya states that costs follow the event unless where there is a good reason to depart from the general rule. This position was reiterated in Republic vs Rosemary Wairimu Munene, Ex-Parte Applicant Vs Ihururu Dairy Farmers Co-operative Society Ltd Judicial Review application *no 6 of 2014* this court held as follows:

“The issue of costs is the discretion of the court as provided under the above section. The basic rule on attribution of costs is that costs follow the event..... It is well recognized that the principle costs follow the event is not to be used to penalize the losing party; rather it is for compensating the successful party for the trouble taken in prosecuting or defending the case.”

7. Flowing from the foregoing, the court finds and orders as follows:

- a. That the respondent's application dated 19th March 2024 is without merit.
- b. The said application is dismissed.
- c. That costs be borne by the respondent.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 25TH DAY OF SEPTEMBER 2024.

S. M. KIBUNJA, J.

ELC MOMBASA.

In The Presence Of:

Applicants : Mr Gathu

Respondent : Mr Waziri

Court Assistant: Leakey

