



REPUBLIC OF KENYA



**Kiniu v Ndungu and Murigi both t/a Annrose Nursery and Primary School & another; Ndung'u (Objector) (Environment & Land Case 179 of 2009) [2024] KEELC 7306 (KLR) (30 October 2024) (Ruling)**

Neutral citation: [2024] KEELC 7306 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 179 OF 2009  
LN MBUGUA, J  
OCTOBER 30, 2024**

**BETWEEN**

**JOSEPH NDICHU KINIU ..... PLAINTIFF**

**AND**

**ANN WAIRIMU NDUNGU AND STANLEY NDUNGU MURIGI BOTH T/A  
ANNROSE NURSERY AND PRIMARY SCHOOL ..... 1<sup>ST</sup> DEFENDANT**

**EMBAKASI RANCHING COMPANY LTD ..... 2<sup>ND</sup> DEFENDANT**

**AND**

**SUSAN NDUNG'U ..... OBJECTOR**

**RULING**

1. Judgment was entered in this matter on 23.6.2022 for the plaintiff against the defendants in the following terms;
  - “i. An order is hereby issued declaring the plaintiff as the owner of the suit land being plots Nos. A69 and A70 mapped out and demarcated as L.R. No. Block 105 (Embakasi Ranching) 1927 and 1928 respectively.
  - i. A permanent injunction is hereby issued against the defendants, their servants or agents from trespassing, alienating or in any way dealing with the suit property in any manner whatsoever and from further construction of the said or any other structures upon the said suit property being plots Nos. A69 and A70 on LR 10904/2 and mapped out and demarcated as LR No. Block 105



(Embakasi Ranching)/ 1927 and LR No. Block 105 (Embakasi Ranching)/ 1928.

- ii. An order is hereby issued for the eviction of the defendants, their servants, agents, relatives and / or employees from the suit property being plots nos. A69 and A70 on LR 10904/2 and mapped out and demarcated as LR No. Block 105 (Embakasi Ranching)/ 1927 and LR No. Block 105 (Embakasi Ranching)/ 1928.
- iii. The Registration of the suit properties bearing particulars of plot Nos. V4510 and V4511 and or Nairobi Block 105 (Embakasi Ranching) 1916 and 1917 in the names of Stanley Ndungu Murigi or the 2nd defendant are hereby cancelled.
- iv. The plaintiff is awarded mesne profits amounting to Ksh.7, 000, 000 as against the 1st defendants.
- v. The plaintiff is awarded the costs of this suit as against the 1<sup>st</sup> defendants plus interest at courts rate (the interest to be calculated from the date of delivery of this judgment).”

2. There are now a record 7 applications pending determination before this court and for good order, the court will evaluate each of them in the order of filing, then the court will determine the pending issues.

#### **1<sup>st</sup> Application dated 4.3.2024 by Objector**

3. The Objector seeks to set aside the Notice to vacate issued by regent auctioneers on 1.3.2024. The application is premised on grounds on its face and on the objector’s supporting affidavit sworn on 4.3.2024. She avers that she is the registered owner of parcels Nairobi/Block 105/1927 & Nairobi / Block 105 /1928, but on 1.3.2024, she was served with a notice from Regent Auctioneers dated 1.3.2024 to vacate from her land.
4. The application is also supported by the 1<sup>st</sup> Defendant vide her affidavit sworn on 20.8. 2024. She avers that it is factual that the objector was not a litigant in the matter and that she is the registered owner of parcels Nairobi/Block 105/1927 & 1928 (Embakasi Ranching).
5. She also reiterates her averments in her response to the application dated 18.3.2024, being that certified copies of cadastral maps obtained from the Director of survey as at August 2024 shows that the plaintiff’s parcel of land being plot A69 and A70 and the Objector’s parcels exist and that they are not the same.
6. The plaintiff has opposed this application vide his replying affidavit dated 4.3.2024 where it is averred that both the 1<sup>st</sup> defendant and the objector are in cahoots to transfer the land to the objector so as to defeat the ends of justice. He avers that Ann Wairimu is facing a criminal case Milimani CM’s case no 1696 of 2017 where the investigating officer established that the objector is the daughter to Ann Wairimu. It is further argued that the documents of title being availed by the objector have previously been availed by the defendants which means that they knew each other well.
7. The plaintiff also states that the issues raised by the objector are res-judicata to this court’s ruling of 9.3.2023.



## **2<sup>nd</sup> Application Dated 5.3.2024 by the Objector**

8. In the above application, the objector sought a stay of execution of the decree herein pending determination of the application dated 20.3.2024. (Note that the identified applications of the objector are the ones dated 4.3.2024, 5.3.2024, 10.7.2024, 19.7.2024).

## **3<sup>rd</sup> Application dated 18.3.2024 (By plaintiff)**

9. This application was filed by the plaintiff seeking orders that the 1<sup>st</sup> Defendants and the objectors appear personally before this court to show cause why they should not be cited and convicted for contempt of court and committed to jail accordingly or be condemned to such other penalties as the court may deem fit. He also seeks orders that the alleged contemnors be ordered to purge the ongoing contempt of court by immediately vacating parcels title numbers Nairobi Block 105 1927 and 1928.
10. The application is premised on grounds on its face and on the Plaintiff's supporting affidavit sworn on 18.3.2024. He avers that judgment issued herein was in his favour, awarding him Plots No. A69 and A70. He avers that the 1<sup>st</sup> Defendants and the objector who is their daughter are in contempt of the decree issued herein since they have remained in illegal occupation of the suit properties and have connected electricity to their illegal structures which they are leasing out to some tenants and also farming parts of the said parcels.
11. The application is opposed by the 1<sup>st</sup> Defendants vide the replying affidavit sworn by Ann Wairimu Ndungu on 16.8.2024. She avers that the Plaintiff has not stated the nature of her contempt and that she was not served with the application, nor the order she is alleged to be in contempt of. She avers that she is not an occupant and has never dealt with Plots A69 and A70 contained in LR 10904/2 and that neither she nor Annrose Nursery and Primary School are in possession of Nairobi/Nairobi Block 105/1927 & 19278 as alleged.
12. She contends that in its judgment of 23.6.2022, the court issued permanent injunctions restraining the Defendants from dealing with Plot A69 & A70 on LR 10904/2 which the court erroneously states were demarcated from LR No. block 105 (Embakasi Ranching) /1927 & 1928.
13. She avers that by obtaining certified copies of cadastral maps from the Director of survey, she has established that Plot A69 & A70 on LR 10904/2 and Nairobi Block 105 (Embakasi Ranching) 1927 & 1928 and 1917 and 1916 all exist on the ground and are not one and the same.
14. She avers that her Co-Defendant, Stanley Murigi has since passed away, and that he owned Nairobi / Block 105 (Embakasi Ranching) /1916/1917 which is opposite the objector's lands 1927 and 1928 and that the said parcels are separated by a road.
15. The application is also opposed by the objector vide her replying affidavit sworn on 4.5.2024. She avers that she was not personally served with the orders she is alleged to be in contempt of and was never a party to the suit.
16. That she is not in occupation of parcels A69 and A70 and if they exist, they were never converted to Nairobi /Block 105/1928 & 1927 as the same are registered in her name.
17. She contends that a search of her parcels on the Ardhi Sasa platform on 3.5.2024 reveals that she is the registered owner of the land. She contends that she only became aware of the suit upon regent auctioneers serving her notices to vacate her land upon which she filed objector proceedings.



#### **4<sup>th</sup> Application Dated 6.5.2024 by the 1<sup>st</sup> Defendant**

18. In this application, the 1<sup>st</sup> defendant is seeking leave for the firm of Malela Basil & Co. Advocates to come on record post judgment in place of Muchangi Nduati & Co. Advocates. This application was unopposed and is hereby allowed.

#### **5<sup>th</sup> Application Dated 10.7.2024 by the Objector**

19. In the above application, the objector is seeking orders restraining the Plaintiff from dealing in Land Nairobi /block 105/1928 & 1927 pending hearing of the objector proceedings as well as costs of the application.
20. In a replying affidavit of the plaintiff dated 18.7.2024, it is argued that the objector has been filing a plethora of applications to mislead the court and to cause delay in the matter. It is further argued that the decree has since been executed and the plaintiff now has titles to the suit property.

#### **6<sup>th</sup> Application Dated 18.7.2024 by the Plaintiff**

21. In the above application, the plaintiff seeks orders that the OCS Ruai Police station be directed to provide security during removal and demolition of structures erected on parcel LR No. Nairobi Block 105/1927 and 1928. The application is premised on grounds on its face and on the Plaintiff's supporting affidavit sworn on 18.7.2024 as well as his further affidavit sworn on 4.9.2024. He avers that the eviction order contained in the decree of this court was executed on 10.7.2024 when the illegal trespassers on the suit properties were evicted by police, but there is need for police assistance to remove structures erected on the suit parcels.
22. The application is opposed by the Objector vide her replying affidavit sworn on 5.9.2024 where she again contends that she is the registered owner of Nairobi/Block 105/1927 & 1928. That on 10.7.2024, the Plaintiff and his agents invaded her suit parcel, vandalized property and carted away valuables but no eviction took place as tenants are still on her parcels of land. She contends that the said vandalism incident was reported to police and captured under OB No: 08/10/07/2024.
23. She further states that it is malicious for auctioneers to seek assistance in invading and demolishing structures on the suit land yet she was not a party to the proceedings.
24. The Plaintiff filed submissions dated 4.9.2024 in support of the application in which he reiterates the contents of his affidavit in support of the motion.

#### **7<sup>th</sup> Application Dated 19.7.2024 by the Objector**

25. The objector is seeking orders that judgement delivered on 23.6.2022 and all consequential orders thereto be set aside ex debito justitiae for the matter to be heard afresh. She also seeks to be enjoined as a Defendant /Interested Party with leave to file a statement of defence.
26. The application is premised on grounds on its face and on her supporting affidavit sworn on 19.7.2024 as well as her further affidavit sworn on 28.8.2024. She contends that judgement was issued in relation to Nairobi/Nairobi Block 105/1927 & 1928 where an order for eviction was issued. However, as per the plaint, the suit parcels are Plot A69 & A70 which have no nexus to her parcel of land known as Nairobi/Nairobi Block 105/1927 & 1928 which do not house Ann Rose Nursery and Primary School or the 1<sup>st</sup> Defendants.



27. That as a consequence of the orders issued herein, she stands to be evicted from her own land without being granted a chance to be heard and that she has a triable defence which raises issues worth ventilating on merits.
28. The application is opposed by the Plaintiff allegedly vide a replying affidavit sworn on 6.8. 2024. Though the objector acknowledged in her further affidavit sworn on 28.8.2024 that she was served with the said affidavit which she responded to, the court could not trace this document in the CTS (electronic portal). The Plaintiff filed submissions dated 20.8.2024 which the court has disregarded on account of the fact that the primary pleading which is the replying affidavit could not be traced in the courts digital file (CTS).
29. I have considered all the rival arguments raised in the various applications. I frame the issues falling for determination as;
  - a. Whether the judgment delivered on 23.6.2022 should be set aside for the matter to be heard afresh.
  - b. Whether the Notice to Vacate issued by Regent Auctioneers on 1.3.2024 should be set aside.
  - c. Whether the 1<sup>st</sup> Defendants and the objector are in contempt of this court's orders.
  - d. Whether the OCS Ruai Police Station should provide security during demolition of structures erected on the suit land.

### **On Setting Aside Judgment**

30. The objector seeks to have the judgment set aside on the basis that she was not a party to this suit and she was not heard. This court has discretion to determine an issue relating to setting aside a judgment. In *Mureithi Charles & another v Jacob Atina Nyagesuka* [2022] eKLR, the court stated as follows on the issue;

“In considering whether or not to set aside a judgment, a judge has to consider the matter in the light of all the facts and circumstances both prior and subsequent and of the respective merits of the parties before it would be just and reasonable to set aside or vary the judgment, if necessary, upon terms to be imposed. Hence the justice of the matter and the good sense of the matter, are certainly matters for the judge.”
31. The court has considered the facts and circumstances of the matter. It is noted that the 1<sup>st</sup> Defendants filed a Notice of appeal against the judgement herein. Additionally, the 2<sup>nd</sup> Defendant had sought for a review of the said judgment vide its application dated 18.4.2023, but the same was dismissed on 21.11.2023. The common thread running in the post judgment proceedings is that the defendants and the objector are together in their quest to scuttle the judgment delivered herein.
32. It is further noted from the documents availed by Susan Ndungu (Objector) in support of her application dated 19.7.2024 that her claim to set aside the judgement herein is anchored on her claim of ownership of parcels Nairobi Block 105/1927 and 1928, pegged on leases issued to her on 27.3.2019 and 12.6.2019 respectively. Several points of concern do arise from these averments of the intended interested party/ defendant who is also the objector. Firstly, the said leases were issued during the pendency of the suit, yet on the ground, it is the same land which was being claimed by the plaintiff as noted in this court's ruling of 4.2.2011 (Judge Okwengu as she then was). It follows that the acquisition of the leases by Susan Ndungu was in violation of the doctrine of lis pendence.



33. The Black's Law Dictionary 9<sup>th</sup> Edition, defines lis-pendens as the jurisdictional, power or control acquired by a court over property while a legal action is pending.
34. In the case of Naftali Ruthi Kinyua v Patrick Thuita Gachure & amp; Another [2015] eKLR, the Court of Appeal quoted with approval the case of Mawji vs US International University & amp; another [1976] KLR 185, in which Madan, J.A. had this to say on the aforementioned doctrine:
- “The doctrine of lis pendens under Section 52 of TPA is a substantive law of general application. Apart from being in the statute, it is a doctrine equally recognized by common law. It is based on expedience of the court. The doctrine of lis pendens is necessary for final adjudication of the matters before the court and in the general interests of public policy and good effective administration of justice. It therefore overrides, section 23 of the RTA and prohibits a party from giving to others pending the litigation rights to the property in dispute so as to prejudice the other.....”
35. The court in Naftali Ruthi Kinyua case went on to cite Bellamy vs Sabine (1857) IDeJ 566 where the principle of lis pendens was stated as follows:
- “It is a doctrine common to the courts both of law and equity and rests, as I apprehend, upon this jurisdiction, that it would plainly be impossible that any action or suit could be brought to a successful determination, if alienation pendent lite were permitted to prevail....”
36. It is with no doubt that this case concerns a contested property dispute where litigation commenced way back in year 2009. The acquisition of the leases/titles by Susan Ndungu during the pendency of the suit 10 years later is a manifestation of unabashed quests by Susan Ndungu and the defendants to remove the subject matter from the jurisdiction of the court. A review of the judgment would only entrench their schemes.
37. Secondly, and right on the heels of the of the above point, I find that the aforementioned ruling of 4.2.2011 had clearly restrained the defendants from any dealings with the suit plots A69 and A70. The fact that the Susan Ndungu acquired the leases/titles of Nairobi Block 105/1927 and 1928 does not negate the fact that the land being claimed is the same on the ground though Susan Ndungu would want this court to believe otherwise.
38. Another point to note is that as soon as Susan Ndungu acquired the title to parcel Nairobi Block 105/1928 on 12.6.2019, the plaintiff filed a caution 5 days later on 17.6.2019. This information is discerned from the search availed by Susan Ndungu in support of her application to set aside the judgment. This is another tell tale sign that Susan was aware of the contested issues of ownership and she cannot now feign ignorance of the proceedings which had been on going for more than a decade.
39. Finally, I find that the plaintiff was apparently issued with titles to the suit properties on 26.2.2024 courtesy of the judgment delivered herein. It follows that the legal landscape has changed with the plaintiff now holding a title whose validity has been sanctioned by a rigorous court process spanning 16 or so years.
40. In the end, I find that the prayer for review of the judgment is unmerited.
- On setting aside the Notice to vacate issued by Regent Auctioneers on 1.3.2024.



41. The objector sought to set aside the Notice to vacate issued by Regent Auctioneers on 1.3.2024 on the basis that she is the registered owner of the suit parcels. In *Arun C. Sharma versus Ashana Raikundalia T/A A. Raikundalia & Co. Advocates & 4 Others* [2014] eKLR, it was held that:

“The objector bears the burden of proving that he is entitled to or has legal or equitable interest on the whole or part of the attached property. The key words are; entitled to or to have a legal or equitable interest in the whole or part of the property.”

42. The court has already made a pronouncement that the judgment delivered on 23.6.2022 still stands. The same recognizes the plaintiff as the lawful owner of the suit parcels. Further, the objector was no longer the registered owner of the suit parcels at the time the Notice to vacate dated 1.3.2024 was issued. In the circumstances, there is no basis upon which the notice to vacate can be set aside.

### **Contempt**

43. Vide the application dated 4.3.2024, the plaintiff contends that the 1<sup>st</sup> defendants and the objector are in contempt of this court’s orders as they have violated the judgement delivered herein on 23.6.2022. According to Ann Wairimu Ndungu, Stanley Ndungu Murigi passed away some time back, therefore Ann Wairimu Ndungu is the one cited alongside the objector. The said Defendant contended that she was not served with the orders she is accused of being in contempt of. The objector on the other hand is asserting her claim of ownership to the suit properties.

44. I find that the contemnors have failed to appreciate that court orders must be obeyed unless discharged. In *Trusted Society of Human Rights Alliance v Cabinet Secretary for Devolution and Planning & 3 Others* [2017] eKLR, it was held that;

“It is the plain and unqualified obligation of every person against, or in respect of whom, an order is made by a Court of competent jurisdiction, to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or void”

50. The contemnors are proffering a defence post judgment, a situation which is not tenable. I therefore find that the contemnors identified as ANN WAIRIMU and SUSAN NDUNGU are found to be in contempt of court orders.

### **Whether the OCS Ruai Police Station should provide security during demolition of structures erected on the Suit Land.**

45. In his application dated 18.7.2024, the plaintiff seeks orders that the OCS Ruai provides security during removal & demolition of structures erected on Nairobi Block 105/1927 & 1928. While the plaintiff contends that the invaders on the suit parcel were evicted on 10.7.2024, the Objector termed the said eviction as a vandalism incident to downplay the exercise. The court has pronounced itself that the Plaintiff is the proprietor of the suit parcels. It is also noted that this court had in a ruling dated 2.2.2023 allowed the prayer for the OCS Ruai to facilitate in the enforcement of the judgment. It follows that the orders sought by the plaintiff are geared towards affirming those earlier orders.

46. Before I render a final rendition, I must point out that the filing of a plethora of applications not only negatively affects the overall administrative and efficiency of justice, but the same amounts to an abuse of the court processes. It is clear beyond peradventure that the defendants and the intended defendant/ interested party/ objector are on a mission to birth a Gordian knot post judgment with the aim of convoluting the dispute. To this end, the objector has filed a record 4 applications so far, some are filed



a day after the other (see the ones of 4.3.2024 and 5.3.2024) and she still mentions another one of 20.3.2024!

47. In the case of *Lawrence Kinyua Mwai v Nyariginu Farmers Co Ltd & Another* [2019] eKLR (Mbugua J), the court did not hesitate to sever such a Gordian Knot by striking out many applications which were hindering the finalization of the dispute. And so it is that this court will no longer hesitate to strike out any application(s) that the court considers to be an abuse of the court processes.
48. In the end, the court proceeds to give the following orders;
1. The 1<sup>st</sup> application dated 4.3.2024 by the objector is hereby dismissed with costs to the plaintiff.
  2. The 2<sup>nd</sup> application dated 5.3.2024 by the objector is hereby marked as SPENT, the same having been overtaken by events.
  3. The 3<sup>rd</sup> application dated 18.3.2024 by the plaintiff is allowed in terms that ANN WAIRIMU and SUSAN NDUNGU are found to be in contempt of court orders. As such, a notice to show cause is hereby issued against the aforementioned contemnors to appear before this court to demonstrate why they should not be punished for contempt. The contemnors are condemned to pay the costs of this application.
  4. The 4<sup>th</sup> application dated 6.5.2024 by the 1<sup>st</sup> defendant is allowed with no orders as to costs.
  5. The 5<sup>th</sup> application dated 10.7.2024 by the objector is hereby marked as SPENT.
  6. The 6<sup>th</sup> application dated 18.7.2024 by the plaintiff is allowed to the extent that the OCS Ruai Police station is directed to provide security during the removal and demolition of structures erected on parcel LR No. Nairobi Block 105/1927 and LR No. Nairobi Block 105/1928. The plaintiff is awarded costs of this application as against Ann Wairimu and Susan Ndungu.
  7. The 7<sup>th</sup> application dated 19.7.2024 by the Intended defendant/interested party/ objector (Susan Ndungu) is hereby dismissed with costs to the plaintiff.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 30<sup>th</sup> DAY OF OCTOBER, 2024 THROUGH MICROSOFT TEAMS.**

**LUCY N. MBUGUA**

**JUDGE**

In the presence of:-

Nganga for Plaintiff

Outa for Objector and 1<sup>st</sup> Defendant

Court assistant: Vena

