



**Nalianya & 3 others (Suing as the Trustees of Religious Society of Friends)
v Prichani & 3 others (Environment and Land Miscellaneous Application
124 of 2014) [2024] KEELC 13993 (KLR) (17 December 2024) (Ruling)**

Neutral citation: [2024] KEELC 13993 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION 124 OF 2014
EC CHERONO, J
DECEMBER 17, 2024**

BETWEEN

**VICTOR HONORARY NALIANYA 1ST PLAINTIFF
JACK BENEAH TUMWA 2ND PLAINTIFF
DAVID SALIM NYONGESA 3RD PLAINTIFF
MARGARET NASIMIYU WESONGA 4TH PLAINTIFF
SUING AS THE TRUSTEES OF RELIGIOUS SOCIETY OF FRIENDS**

AND

**JOSECK SIMMIYU PRICHANI 1ST DEFENDANT
EDWARD WANYAMA WANYONYI 2ND DEFENDANT
JOSEPH MASIKA WANYONYI 3RD DEFENDANT
EVANS BARASA WANYONYI 4TH DEFENDANT**

RULING

1. This ruling is in respect of the Applicant's Notice of Motion application dated 02/07/2024 seeking the following Orders:
 - a. This honourable court be pleased to order the Officer in Charge of Kamukuywa Police Station to provide security to the 1st defendant/applicant's Quantity Surveyor and Agriculture Officer during their visit to Land Parcel No. Kimilili/Kamukuya/1407 also known as Kimilili/Kamukuywa/2268 and 2269, for the purpose of conducting inspections and preparing their respective reports.



- b. Costs to be in the cause.
2. The application is supported by the affidavit of Koseck Simiyu Prichani, the 2nd Applicant herein sworn on 02/07/2024.
 3. In the said Supporting affidavit, the Applicant stated that the court allowed the Applicant to amend their defense and counterclaim and that he is desirous to include the value of the properties that were destroyed on land parcel no. Kimilili/Kamukuywa/1407 a.k.a Kimilili/Kamukuywa/2268 and 2269 in the counter-claim. He deposed that on 28/06/2024, he attempted to visit the subject land in the company of a valuer but the people occupying the land are hostile.
 4. In opposition, the 2nd Plaintiff/Respondent filed a Replying affidavit sworn on 10/09/2024 where he deposed that the application is a delaying tactic by the Applicant who has delayed this matter from taking off since 2014. That the Applicant has no legal or beneficial interest in the suit parcel of land that can be acted upon. That the application is vague as the Applicant has not demonstrated when and what was destroyed that ought to be accessed for purposes of valuation.
 5. The 2nd, 3rd and 4th Respondents also filed grounds of opposition dated 11/07/2024 where they termed the application fatally defective and sought to have the same struck out.
 6. The parties took directions to have the application canvassed by way of written submissions.
 7. The applicant filed submissions dated 10/09/2024 and submitted that the application is pegged on the provisions of Article 159 of *the Constitution* and Section 1A and 1B of the *Civil Procedure Act*. It was his position that the reports sought are important for purposes of the counter-claim as they will enable the Applicants to quantify the damages claimed and they can only be prepared upon a site visit. They urged that due to the hostility of the occupants, it was necessary to have the expert granted security. They cited the case of Kenya Anti-Corruption Commission vs. Land Limited & Others (2016)
 8. The 2nd, 3rd and 4th defendants filed submissions dated 30/09/2024 where they submitted that the application was fatally defective as it is not grounded on any provisions of the law. That the said application is supported by a further affidavit as opposed to a supporting affidavit. They urged the court to struck out the application for being defective They relied on Rule 19 of the Mutunga Rules and the case of University of Nairobi vs. George Mabele Sifuna ELRC Appeal No. 22 of 2022(2012)

Legal Analysis and Decision

9. I have considered the application, the rival affidavits and grounds of opposition as well as the submissions by counsel. This is an application where the Applicant seeks an order for security.
 10. First and foremost and as correctly pointed out by the 2nd, 3rd and 4th respondents, the Applicant has not cited any provision of the law to anchor the orders sought in the application. He stated that the application is just as plain as any other draft as it is made without citing the law which gives the court the power to grant the orders. Apart from that, the court notes that the application is not supported by an affidavit but by a document christened as a 'further affidavit'. I note that the said application has been prepared by an advocate and therefore, need not say more. However, in the interest of justice, I now proceed to consider the merit or otherwise of the application, notwithstanding the technicalities.
11. It is clear that the Applicant herein is seeking for security orders to have a quantity surveyor and agricultural officer access the suit property for purposes of preparing a report detailing the damages he



intends to seek in his counter-claim. In the case of Lydia Muthoni Nabea –vs- Benson Kiriinya & 2 Others (2008) Eklr, the court held;

“Courts will be reluctant to involve the Police in effecting Court Orders in purely civil proceedings. In very rare and exceptional cases will the Court direct the Police to be involved in the execution of its order issued in the exercise of its civil jurisdiction. But even then the Applicant must demonstrate that there is a real threat to peace and tranquility in which case the role of the Police will only be confined to maintenance of law and Order.”

12. Being guided by the above case law, my examination of the application is that the Applicant has not demonstrated that a threat to peace and tranquility has been made against the alleged officers. The court has not been told which of the parties specifically prevented the said officers from performing the purported duties and in what way they were so prevented. As a general proposition, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of section 107 (1) of the *Evidence Act* (Chapter 80 of the Law of Kenya), which provides:

“ 107.

- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist...”

13. In totality, it is my considered view that the application lacks an iota of seriousness. It is not an investment in a conscious search for the truth or even fairness.
14. In the upshot, I find the said Notice of Motion application dated 02/07/2024 devoid of merit and the same is hereby dismissed with costs to the Respondent.
15. It is so ordered.

DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 17TH DAY OF DECEMBER, 2024.

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HON.E.C CHERONO

ELC JUDGE

In the presence of

Mr. Wasilwa H/B Capten for the 1st Defendant/Applicant

Mr. Rono for the 2nd, 3rd & 4th Respondents.

Mr. Masika H/B for Wekesa for the plaintiff/Respondent.

Bett C/A

