



Ngumu Pioneers Ltd v Michael & 2 others (Environment & Land Case E006 of 2022) [2023] KEELC 15937 (KLR) (22 February 2023) (Ruling)

Neutral citation: [2023] KEELC 15937 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE E006 OF 2022**

A NYUKURI, J

FEBRUARY 22, 2023

BETWEEN

NGUMU PIONEERS LTD PLAINTIFF

AND

ESTHER NGONDU MICHAEL 1ST DEFENDANT

ZETUS KENYA LIMITED 2ND DEFENDANT

PAULINE MWELU MICHAEL 3RD DEFENDANT

RULING

1. Before court is a Notice of Motion dated May 13, 2022 filed by the 1st and 2nd Defendants seeking the following orders;
 - a. Spent.
 - b. That the orders made by the Honourable Court on March 24, 2022 be set varied, reviewed and or set aside.
 - c. The orders of status quo issued on March 24, 2022 be limited to a portion of land forming part of Plot Nos 2536 (Syumbuni 44) and Plot No 2292 (Syumbuni 43) measuring approximately 6.5 Acres beacons by Mr Oiro Owino – Surveyor on November 20, 2019 and not the whole fourteen (14) acres.
 - d. That the costs of this application be provided for.
 - e. That such further and other relief be granted to the Applicant as this court deems fit and expedient in the circumstances.
2. The application is premised on the grounds on its face together with the affidavit of Pauline Mwelu Michael, the 2nd Defendant sworn on May 13, 2022. It was the Applicants’ case that on March 24,



2022, by consent of all the parties, the court made orders of status quo in respect of premises known as Plot No 2536 (Syumbuni 44) and Plot No 2292(Syumbuni 43) (suit properties) pending hearing and determination of this suit.

3. They further averred that the suit properties measure 14 acres when the Plaintiff had leased only 6.5 acres which had been hived and beacons before signing of the lease agreement herein. They also stated that the orders of March 24, 2022 were highly prejudicial as the 3rd Defendant who had bought the whole land cannot utilize it when the claim by the Plaintiff is for only an identifiable portion. They sought that the orders of March 24, 2022 be limited to the beacons portion in accordance to a survey report attached to the application.
4. The application was opposed. Hu Xiao Mei for the Plaintiff swore a replying affidavit dated June 16, 2022 opposing the application. It was the Respondent's case that the Application was nefarious, riddled with falsehood and intended to mislead the court. They pointed out that in 2021 when they sought to injunct the 3rd Defendant from further trespassing on the suit property, the 1st and 2nd Defendants swore that they have never identified or marked out a portion of two parcels. That the same position was taken by the 1st and 2nd Defendants in their witness statements and therefore it is surprising that the Applicants have changed tune on the issues.
5. The Respondent also stated that the surveyor's report attached to the application was dated November 20, 2019, while the affidavit stating that there was no demarcation was dated March 22, 2021. Therefore, the Respondent stated that the conclusions are therefore either the survey report was counterfeit or at the time of swearing the affidavit dated March 22, 2021, the 1st and 2nd Defendants were aware of the survey report but deliberately chose to mislead the court to prejudice the Plaintiff. It was their position that the Applicants were guilty of perjury and were undeserving of the orders sought as they had come to court with unclean hands.

Analysis and Determination

6. Having considered the application as well as the replying affidavit, it is my considered view that the issue that arise for determination is whether there is sufficient cause to justify setting aside of the orders of this court made on March 24, 2022.
7. It is not in dispute that the orders made on March 24, 2022, were to preserve the status quo obtaining on the suit properties pending hearing and determination of this suit in view of the overriding objective of the *Civil Procedure Act*. This was for purposes of expediting the disposal of this suit in view of the fact that the court's diary is overstretched.
8. The only reason for the prayer for setting aside is that there was a surveyor's report made on 20th November 2019, which marked out the leased portion, and that if the orders of status quo continue to be in force, the 3rd Defendant shall suffer prejudice. In my view those reasons cannot be sufficient reasons to set aside orders granted interpartes. To begin with, if the 3rd Defendant was indeed prejudiced by the orders as argued by the 1st and 2nd Defendants, they could have been the ones seeking the said orders. The Applicants cannot purport to seek for the orders to protect the interests of the 3rd Defendant when the latter are ably represented in this matter by counsel and when there is no evidence that they have authority to seek for orders on behalf of the 3rd Defendant.
9. In addition, the Plaintiff in his replying affidavit attached an affidavit sworn on March 22, 2021 by the 1st and 2nd Defendants in Machakos ELC Suit No E032 of 2021 as well as the Applicants' witness statement of even date where the Applicants were categorical that the leased portion was never identified or marked out on the two suit properties. If indeed that was the position as of March 22,



2021, then the surveyor's report dated November 20, 2019 was merely created and tailor-made by the Applicants for purposes of the application herein. I say so because the evidence in the Plaintiff's replying affidavit was never rebutted and the attached affidavit sworn by the 1st and 2nd Defendants on March 22, 2021 and their witness statement of even date were never denied as having been filed by the Applicants.

10. The Applicants have sought for equitable orders yet they have come to court with unclean hands by making contradictory averments. Therefore, this court is not convinced that the Applicants deserve the orders sought. The application serves on other purpose than to delay the expeditious disposal of this matter.
11. In the premises, I find no merit in the application dated May 13, 2022 and the same is hereby dismissed with costs.
12. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 22ND DAY OF FEBRUARY 2023 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A NYUKURI

JUDGE

In the presence of;

Mr Njuguna for 3rd Respondent

Mr Kiprotich for Plaintiff

No appearance for the 1st and 2nd Respondents

Josephine – Court Assistant

