



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAKAMEGA**

**SUCCESSION CAUSE NO.246 OF 1989**

**IN THE MATTER OF THE ESTATE OF OLOO OMOLO LUMASI - DECEASED**

**BETWEEN**

**GRACE ANDREW OMASO..... PETITIONER /ADMINISTRATOR**

**AND**

**ELPHAS WAMBUTSI WASHIALI .....APPLICANT**

**RUTH AUMA ANDATI**

**HANNINGTON NANDWA.....RESPONDENTS**

**RULING**

**1. INTRODUCTION**

By an order dated 23<sup>rd</sup> day of July 2013 the court directed that the petitioner/administrator's (deceased) name be substituted by the 1<sup>st</sup> and 2<sup>nd</sup> respondents and further issued an injunction to the respondent restraining them from dealing and/or interfering with the suit land herein EAST/WANGA/ISONGO/533. Injunctive orders were also issued to the Land registrar Kakamega restraining him from dealing with the said land. The application was to be heard inter parties by oral evidence and a date was given.

On the 27<sup>th</sup> February 2014 a consent was recorded between counsels for both the applicant and respondents and it was ordered that there be a survey of the suit land herein i.e. L.R No. East/Wanga/Isongo/533, and the contributions to be made by each party towards the same and the date the survey was to be undertaken.

**2. THE APPLICATION**

The applicant then filed the application dated 8<sup>th</sup> June 2016 seeking that the respondents be punished for disobedience of the court order issued on 23<sup>rd</sup> July 2013. The application is supported by a supporting affidavit dated 8<sup>th</sup> June, 2016, a further affidavit dated 1<sup>st</sup> November, 2016 and a further affidavit dated 16<sup>th</sup> June 2017. The applicant depones that the respondents were served with the said court order which they disobeyed and therefore that they should be punished. He further depones that the respondents sold portions of LR E/Wanga/Isongo/533 to third parties including Emmanuel Namunua, Reuben Mboya and Peter Sakwa. That the respondents have burnt his sugarcane and destroyed his banana plantation and nappier grass. That he has been forcibly evicted from the said parcel of land and that the respondents and third parties are utilizing it. Therefore that the respondents are in contravention of the court order issued on 23<sup>rd</sup> July, 2013.

**3. THE RESPONSE**

The 1<sup>st</sup> respondent opposed the application and has filed grounds of opposition dated 20<sup>th</sup> June 2016 and a replying affidavit dated 18<sup>th</sup> November, 2016. She says that the applicant's notice of motion does not clearly state in what manner the petitioner/respondent has violated the court order issued on 23<sup>rd</sup> July 2013 and as such the motion is at best vague.

In the replying affidavit the 1<sup>st</sup> respondent does not dispute that she was served with the order dated 23<sup>rd</sup> July 2013. She makes reference to the order issued on 27<sup>th</sup> February 2014 and states that pursuant to that consent order, a survey was done in April 2014 and the surveyor filed a report that she annexed as "RAA2." She says that it is evident from the said report that Emmanuel Omoto Namunua and Reuben Wakhu Washiali were already some of the persons in occupation of the estate when the survey was done. She states in her affidavit that Peter Sakwa purchased his portion of land from Juma Olumasai Maende who was also in occupation of the estate. That the applicant fully participated in

the survey exercise at which stage he did not raise the current complaints. She denies that she has ejected the applicant from his share of the estate as he has full access to his portion of land and regularly farms thereon. She denies that she is in violation of the court order.

#### **4. DETERMINATION**

The issue for determination is whether the petitioner/respondents are guilty of contempt of court for disobeying this court's order dated 23<sup>rd</sup> July 2013.

The 1<sup>st</sup> respondent has confirmed that she was aware of the order dated 23<sup>rd</sup> July 2013 but states that there was another order dated 27<sup>th</sup> February 2014 to survey the land in question for all the persons who were in occupation of the land. The surveyor's report "RAA2" indicates that the applicant had a share on the land. The report further indicates that the applicant is claiming more land from the share of the 1<sup>st</sup> respondent, Ruth Auma.

The standard of proof in matters of contempt of court is well settled. It must be higher than proof on a balance of probabilities, almost but not exactly beyond reasonable doubt – see the case of Mutitika vs Baharini Farm Limited (1985) KLR 229.

Upon perusal of the evidence placed before me, I am not satisfied that the petitioners/respondents are in contempt of court. In the first place, the applicant says that he reported the damage to the crops to various police stations. However he did not annex any police station Occurrence Book reports to indicate that he did so. More so, his complaints to the District Agricultural office of damaged crops was in 2013 and 2014. He filed the instant application in June 2016. Why then did it take him 3 years to file the current application if his complaints were genuine?

Secondly, though the applicant says that he was evicted from the land, he does not say when this happened.

Thirdly, though the applicant says that the respondents sold the land to third parties, he has not attached any sale agreements between the respondents and the third parties to prove any such sale. Neither does he state the dates when the land was sold.

The surveyor's report indicates that the applicant is one of the beneficiaries of the estate in issue. The applicant did not challenge the surveyor's report and as such he still remains one of the beneficiaries of the estate. His claim will be ventilated during distribution of the estate.

In the foregoing, the allegations raised in the contempt proceedings have not been proved to the required standard. The applicant has failed to prove the allegations of sale or interference of the suit parcel of land by the respondents.

The application dated 8<sup>th</sup> June 2016 lacks merit and it is dismissed with costs to the 1<sup>st</sup> respondent.

**Dated, signed and delivered at Kakamega this 23<sup>rd</sup> day of February, 2017.**

**J. NJAGI**

**JUDGE**

In the presence of 1<sup>st</sup> respondent.