



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND COURT CASE NO. 207 OF 2010

ELKANA OMBAIRE MONYENYE PLAINTIFF

VERSUS

DANIEL OUKO OMOKO 1ST DEFENDANT

LAWRENCE ONKOBA OUKO..... 2ND DEFENDANT

RULING

1. Before me for determination is the plaintiff/applicant's Notice of Motion application brought under order 40 Rules 1 and 3, Order 51 Rules 1, 3 and 4 of the **Civil Procedure Rules**. The application seeks the following substantive orders:-

1. THAT 1st defendant/respondent be condemned for disobeying this court's order given on 16th November, 2010.

2. THAT the 1st respondent be condemned to jail term not exceeding 6 months or such term this court will deem fit or his properties be sequestrated.

3. Costs of the application.

2. The application is supported on the grounds set out on the body of the application namely that:-

(a) That this honourable court issued injunction reliefs on 16th November 2010 issues on 23rd December, 2010.

(b) That the respondents were served with the said orders on 25th day of November, 2013 together with the penal notice endorsed thereon.

(c) That the respondents in flagrant violation of the same treated the said order with impugny by planting maize on the suit land, cut down bananas and chased the plaintiff from the suit land.

(d) That court orders are not issued in vain and that the dignity of the court ought not to be brought into disrepute.

3. The plaintiff's application is further supported on the affidavit sworn in support by the plaintiff Elkanah Ombaire Monyenye on 22nd January 2014. The plaintiff depones that the court order given on

16th November 2010 endorsed with the penal notice was served on the respondents on 25th November 2013 as per the affidavit of service by one Elijah Gekonge Nyangau. The plaintiff further avers that he had earlier on vide an application dated 10th October 2011 seeking the punishment of the defendants for contempt of court but the application was dismissed for want of proper service. The plaintiff depones that in spite of being aware of the court order the 1st defendant went ahead and planted where they had earlier harvested maize and beans and have cut down the plaintiff's bananas and chased the plaintiff from the suit land on 8th January, 2014 and created a path through the suit land. The plaintiff states the 1st defendant and his wife threatened him and warned him not to step on the suit land. The plaintiff further avers the 1st defendant on 15th January 2014 cut napier grass on the suit land and contends the 1st defendant's acts are in flagrant disobedience of the court order and urges the court to punish him for disobeying the court order.

4. The 1st defendant filed a replying affidavit in opposition to the plaintiff's application dated 21st May 2014 in which he takes issue regarding the delayed service of the order. Though the order was issued on 23rd December 2010 the same was served on the defendants on 25th November 2013. The 1st defendant states the plaintiff is guilty of delay in prosecuting the matter which depicts lack of interest in the matter and therefore ought not to be entitled to the orders sought. The 1st defendant further alleges the plaintiff has not particularized the contemptuous acts on the part of the defendant that are said to constitute breach of the court order.

5. The parties canvassed the application dated 22nd January, 2014 by way of written submissions. The plaintiff applicant's submissions were filed on 8th June 2015 while the 1st defendant's submissions were filed on 6th November 2015. The court has reviewed the court record, the plaintiff's application together with the affidavits in support and in opposition and the parties submissions.

6. The court record shows that the plaintiff filed an originating summons (OS) on 20th July 2010 against the defendants claiming to have become entitled to a portion of 1.5 acres approximately of land parcel **Kebirichi Scheme/702** by virtue of adverse possession. On 11th October 2010 the plaintiff filed a chamber summons application seeking an order of injunction to restrain the defendants from interfering with the plaintiff's possession and occupation of the portion of the suit property. The application came up for hearing on 16th November 2010 when only the plaintiff and his counsel attended. The matter proceeded ex parte and the plaintiff's application was granted resulting in the order that was issued on 23rd December 2010. The record further shows the defendants vide a Notice of Motion dated 8th June 2011 applied to have the ex parte orders of injunction issued on the plaintiff's application set aside. Although this application was listed severally for directions the same does not appear to have been heard and/or disposed of in any other manner.

7. The plaintiff in the meantime filed his application dated 10th October 2011 on 19th October 2011 where the plaintiff sought orders against the defendants for committal for disobeying the order of injunction granted on 16th November 2010. This application by the plaintiff was heard, and a ruling was delivered by Okong'o J. on 25th October 2013 dismissing the application. The record shows that the originating summons though filed over 5 ½ years ago, no directions as to its disposal have ever been taken or given. The plaintiff, it would appear has been only keen to preserve the advantage he acquired when he was granted the injunction.

8. The issue that arises for determination is whether the injunction was to last in perpetuity once granted. Before the revocation of the previous Civil Procedure Rules by the implementation of the Civil Procedure Rules, 2010 following the wholesale amendment of the Civil Procedure Rules, injunctions once granted had no limited duration of validity. However following abuse of injunctions by parties, whereby parties could sit on injunctions and frustrate the hearing of the cases particularly where the injunction conferred a position of advantage to the party, the Rules Committee saw it fitting to limit the duration of validity of injunctions. That saw the introduction of Order 40 Rule 6 in the Civil Procedure Rules which limits the validity of an injunction to a period of 12 months from date of issue unless otherwise extended by Order

of the court.

9. Order 40 Rule 6 provides:-

6. Where a suit in respect of which an interlocutory injunction has been granted is not determined within a period of twelve months from the date of the grant, the injunction shall lapse unless for any sufficient reason the court orders otherwise.

The Civil Procedure Rules 2010 came into force from 9th December 2010 and considering the Revocation and Transitional Provisions under Order 54 of the **Civil Procedure Rules 2010** Order 40 Rule 6 would apply to suits filed prior to December 2010 where injunctions had been granted albeit with modifications.

Order 54 rule 2 of the Civil Procedure Rules 2010 provides:-

2. In all proceedings pending whether preparatory or incidental to, or consequential upon any proceedings in court at the time of coming into force of these rules, the provisions of these rules shall thereafter apply, but without prejudice to the validity of anything previously done.

Provided that:-

(a) If, and in so far as it is impracticable in any such proceedings to apply the provisions of these rules, the practice and procedure heretofore obtaining shall be followed.

(b) In any case of difficulty or doubt the chief justice may issue practice notes or directions as to the procedure to be adopted.

10. Applying Order 40 rule 6 and having regard to the transitory provisions to the circumstances of this case my view is that the order of injunction granted on 16th November 2010 and issued on 23rd December 2010 lapsed at the outset on 22nd December 2011 after the expiry of 12 months from the date of issue given that the plaintiff never sought its extension from the court. The previous application for contempt was made during the validity period of the order of injunction. However the present application dated 22nd January 2014 was brought after the order of injunction had lapsed by operation of the law. There was no valid order in force which was capable of being disobeyed.

11. I accordingly hold and find the plaintiff's application dated 22nd January 2014 to be incompetent and the same is hereby struck out with no orders as to costs.

Ruling dated, signed and delivered at Kisii this 26th day of February, 2016.

J. M MUTUNGI

JUDGE

In the presence of:

..... for the plaintiff

..... for the 1st defendant

..... for the 2nd defendant

J. M. MUTUNGI

JUDGE