



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT CHUKA

CHUKA ELC [OS] CASE NO E001 OF 2021

GEOFFREY KIANIA KAMWARA.....PLAINTIFF/APPLICANT

VERSUS

MWIKAMBA KAGEMBE.....DEFENDANT/ RESPONDENT

RULING

1.This Ruling is in respect of the Notice of motion application dated **12th November 2021**. The application seeks for orders that:

- i.THAT this Application be certified as urgent and heard exparte in the first instance.
- ii.THAT the Defendant/Respondent be committed to civil jail for disobeying court orders issued on 18th May,2021.
- iii.That the officer Commanding Marimanti Police Station be ordered to effect the orders herein.
- iv.THAT the cost of this application be borne by the Respondent.

2.The Notice of Motion is premised on the grounds:

- a)That this Honourable court issued orders on 18th May, 2021 to the effect that the Respondent or anyone acting on his behest is restrained from evicting the Applicant from land reference number THARAKA/CHIAKARIGA A'/1485 or demolishing the Applicant's houses pending the hearing and determination of the suit.
- b)THAT in the blatant disobedience of this Court's order, the Defendant/Respondent has started encroaching on the areas occupied by the plaintiff/Applicant and started clearing the bush where the Plaintiff/Applicant had preserved for grazing his cattle and goats.
- c)THAT the Defendant/Respondent has prevented the Applicant from entering the suit land.
- d)THAT the contempt is glaring on the face of it.
- e)That the Respondent is acting with impunity and is in total disregard and are abusing the court process.
- f)THAT the Court does not make orders in vain.

3.The application is further supported by the affidavit of Geoffrey Kiania Kamwara sworn on 12th November, 2021 wherein he avers that on the 18th May, 2021, the Honourable court issued an order to the effect that the Respondent or anyone acting on his behest is restrained from evicting him from land reference number THARAKA/CHIAKARIGA ' A'/1485 or demolishing his houses pending the hearing and determination of the suit and has attached court orders marked as GKK1a & b.

4.The applicant avers that in blatant disobedience of the said orders, the Respondent hired goons who prevented him from accessing the suit land. That on 10th and 11th November,2021 the Defendant/Respondent accompanied by the area assistant chief and some people came to the applicant's home and threatened to demolish his houses and chase him out of the suit land.

5.The applicant contends that the Respondent has started cutting trees from the suit land and burning bushes where the Applicant used to graze his cattle and goats. That up to the time of filing the application, workmen who were clearly working on the instructions of the

Respondent entered the suit land and started cutting trees and clearing the bush which area the Applicant had preserved for grazing purposes. He has attached photographs allegedly showing workmen on the site marked as GKK2.

6.The applicant avers that the Respondent has on several occasions threatened to evict him from the suit land and is using the local administration to harass him in order to defeat his claim for adverse possession. That he has been advised that court orders are never made in vain and they ought to be obeyed. He stated that he has continued to suffer damages and his source of livelihood has greatly been affected because the Respondent has prevented him from cultivating on the suit land.

7.The applicant contends that the Respondent is making a mockery of the Honourable court and prays he be compelled to obey the court orders issued on 18th May,2021 and be committed to civil jail and the O.C.S Marimanti Police Station be ordered to arrest the Respondent and all the persons acting under him in disobedience of the court order. He prays that the application be allowed with costs.

8.On the 9th of December, 2021 the respondent filed a Replying affidavit sworn on 24th November, 2021.

9.The respondent contends that the documents duly filed in court, specifically the Annexure marked as MK-5 in his replying affidavit dated 05.03.2021 is very clear that his land is not vacant and that, he partly lives in it and does subsistence farming on it and that it is the plaintiff who has been interfering with the quiet enjoyment of the Respondent's land.

10.The respondent avers that he has been advised by his advocates that the effects of the orders issued on 18.05.2021 are to stop him from evicting the plaintiff from his land, given that the Applicant has expressly admitted in his pleadings that the land he occupies is not his and that the Respondent is the lawful owner and has not in any way evicted the plaintiff and has not specifically proven that he has been evicted therefrom and to inhibit the Respondent from registering any dealings with the land. He avers that he has not and does not intend to register any dealings and that all he needs is the plaintiff to get out of the land.

11.The respondent further avers that he is advised by his advocates on record that the effect of the order of 18.05.2021 was not to disenfranchise him or to stop him from enjoying the quiet possession of his land or even stop him from making the use of his land as he has been doing over the years.

12.The respondent contends that he is perturbed given that he should be the one who should be actually lodging a complaint for contempt in this court owing to the way the plaintiff has been conducting himself towards his occupation and quiet enjoyment of the Respondent's land. That on 30th September,2021 the Respondent's sister JOSELINE GAKUNGA who is his neighbour and who has been his farm caretaker and who has been attending to his farm and animals on his farm on his behalf was going about her usual chores when the plaintiff while armed with a machete, went and cut the ropes onto which the Respondent's cows were tethered and viciously threatened and chased away the said JOSELINE GAKUNGA along with the cows and that that conduct was reported at Chiakariga Police station and has annexed and marked MK1 a copy of police Report OB reference number for 30.09.2021.

13.The Respondent further states that on 2nd October 2021, when the Kenya power people had come to connect power to his house, which is on the subject land, the plaintiff prevailed upon them not to do so through threats as the Respondent was not around himself and eventually as they were fearing for their own safety owing to the kind of threats they were receiving from the plaintiff. The respondent avers that on the contrary he should be the one who should appear in the court for contempt against the plaintiffs, but states that he is a peace loving and law abiding citizen who is always keen to respect the rule of law.

14.The respondent contends that he is the absolute registered owner of all that parcel of land title number THARAKA/CHIAKARIGA 'A'/1485 measuring 3.57 Ha and that an order of inhibition does not in any way prevent him from using his land as it only restrains him from registering and dealing with the land and he has not registered any dealings with land, nor has he evicted the plaintiff from the portion of his land that he illegally occupies.

15.The respondent avers that the plaintiff's notice of motion application dated 12th November,2021 is highly misconceived, a non- starter, vexatious, frivolous, scandalous and an abuse of the court process. That it is in the interest of justice that the application be dismissed with costs to the Defendant/Respondent.

16.The matter was canvassed by way of written submissions. The applicant in his submission dated 29th of December 2021 submitted that after the court issued the orders herein on 18th May, 2021, the Respondent started threatening to use all means to evict the Applicant. That the Respondent also went ahead to do acts that are in contempt such as trying to connect electricity on the suit land. The Applicant has cited Order 40 Rule 3 (1) of the Civil Procedure Rules which stipulate as follows: -

In cases of disobedience, or breach of any such terms, the Court granting an injunction may order the property of the person guilty of such disobedience or breach to be attached, and may also order such person to be detained in prison for a term not exceeding six months unless in the meantime the Court directs his release.

17.The applicant has also relied on the case of Econet Wireless Kenya Ltd v Minister for Information & Communication of Kenya & Another (2005) KLR 828, where Ibrahim, J. (as he then was) underscored the importance of obeying court orders.

18.The applicant submitted that the court issued a valid order which the Respondent has disobeyed. That the Respondent had knowledge or notice of the said order as he was present in court and was represented by a counsel when the court pronounced those orders and that the respondent has not denied knowledge of the said orders. That the Respondent has willfully disregarded the said orders by constantly harassing the Applicant and felling trees and urged the court to commit him to 6 months' imprisonment.

19.The respondent in his submissions dated 16th of January 2022 submitted that the order for contempt should not be enforced against him

for the following reasons; first that the plaintiff/Applicant did not serve the Defendant/Respondent with a copy of the order personally with a notice informing the Defendant of the consequence if the orders are disobeyed; secondly, that the court must also be satisfied that the terms of the order are clear and unambiguous and finally that the breach must be proved beyond reasonable doubt. The respondent relied on the case of *Ochino & Another vs Okombo & 4 others* (1989) eKLR to support the above assertion.

20. The respondent submitted that the power to deal with contempt of court is provided for under section 5 of the Judicature Act (Cap 8) and order 39 rule 2(3) of the Civil procedure rules. The respondent further relied on the case of *Mwangi Mangondu vs Nairobi City Commission* (Civil Appeal No.95 of 1988) to demonstrate that the court will only punish for contempt a breach of injunction if satisfied that the terms of the injunction are clear and unambiguous.

21. The respondent submitted there is no evidence that the Respondent was served with a copy of the order together with a penal notice and submitted that the application dated 12th November 2021 lacks merit, is incompetent and should be dismissed.

22. Further, the respondent submitted that the Applicant failed to prove that the Respondent did intentionally and willfully disobey the court orders and must be sanctioned for the same and cited the case of *JGK vs FWK* (2019) eKLR wherein Gikonyo J stated that **“the standard of proof in contempt matters is beyond the balance of probabilities. There is good reason for the high standard: the proceedings are quasi-criminal: penal sanctions are likely to be imposed and the liberty of the contemnor is at risk...”** The respondent further cited the case of *Katsuri Limited v Kapurchand* (2016 Eklr) to demonstrate the stand of proof in contempt cases.

23. Lastly the respondent cited the case of *Samwel M.N.Mweru & Others v National Land Commission & 2 others* to illustrate the test for when disobedience of a civil order constitutes contempt. The respondent submitted that the plaintiff/Applicant has not proven beyond reasonable doubt the requirement for enforcement of an order for contempt against the Defendant and therefore submitted that the application lacks merit and must be dismissed.

ANALYSIS & DETERMINATION

24. I have considered the application, the response of the respondent and the submissions by both parties.

25. The Contempt of Court Act is no longer operative as from the date of the judgment declaring it unconstitutional in **Kenya Human Rights Commission v Attorney General & Another [2018] eKLR**. I am therefore obliged to revert to the provisions of the law that was operative before the enactment of the Contempt of Court of Act to avoid a lacuna in the enforcement of Court's orders. It was in this respect observed in **Republic v Returning Officer of Kamkunji Constituency & The Electoral Commission of Kenya HCMCA No. 13 of 2008**, that the High Court has the responsibility for the maintenance of the rule of law, hence there cannot be a gap in the application of the rule of law.

26. *The Court of Appeal in Christine Wangari Gachege v Elizabeth Wanjiru Evans & 11 Others, [2014] Eklr, found that the English law on committal for contempt of court under Rule 81.4 of the English Civil Procedure Rules, which deals with breach of judgment, order or undertakings, was applied by virtue of section 5(1) of the Judicature Act which provided that:*

“The High Court and the Court of Appeal shall have the same power to punish for contempt of court as is for the time being possessed by the High Court of Justice in England, and that power shall extend to upholding the authority and dignity of subordinate courts.”

27. *The Applicant herein contends that the orders of the court that were issued on 18th May, 2021 were disobeyed by the Respondent. The court will examine the said orders to ascertain whether they were disobeyed by the Respondent as stated by the Applicant.*

28. *The Plaintiff/Applicant made an application dated 16th February, 2021 seeking orders of temporary injunction and inhibition restraining any dealings whatsoever with Land Parcel No. THARAKA/CHIAKARIGA/A/1485 until the suit is heard and determined. The court considered the said application and in the ruling dated 18th May, 2021 ordered as follows:*

“1. That the Respondent or any other person acting at his behest be and is hereby restrained from evicting the Applicant from the suit land or demolishing his houses pending hearing and determination of this suit.

2. That an order of inhibition be and is hereby issued restraining any dealings whatsoever with Land Parcel No. THARAKA/CHIAKARIGA 'A'/1485 pending hearing and determination of this suit.

3. That costs shall be in the cause.”

29. *The Applicant alleges that in blatant disobedience of this court's orders, the Respondent has started encroaching on the areas occupied by the Applicant and started clearing the bush where the Applicant had preserved for grazing his animals, and that the Respondent has prevented the Applicant from entering the suit land.*

30. *By consent of the parties, the Deputy Registrar of this court made a scene visit and filed a report. I have perused the said report. The same states that there was evidence that the Respondent had recently cleared part of the suit land and planted green grams. The orders issued by the court on 18th May, 2021 inter alia restrained the Respondent from evicting the Applicant from the suit land or demolishing his houses pending hearing and determination of the suit. From the material on record and the report filed, there is no evidence to show that the Applicant was evicted and or that his houses were demolished by the Respondent. The said orders issued by the court were very specific. I am not persuaded that the orders made by the court on 18th May, 2021 have been disobeyed. I say so because there is no evidence to show that the Applicant has been evicted or that his houses have been demolished. Further, there is no evidence to show that the order of*

inhibition has been breached by the Respondent.

31.The court will only punish for contempt if satisfied that the terms of the orders were clear and unambiguous and the contemnor had proper notice of the terms of the orders. In my view, the terms of the orders were clear, that the Respondent may not evict the Applicant from the suit land or demolish his houses pending the hearing and determination of the suit. There was also an order of inhibition granted restraining any dealing whatsoever with the suit land. Since there is no evidence of eviction or demolition or any registration of the suit land, there is no basis upon which this court can find the Respondent in contempt and commit him to civil jail as sought.

32.It is trite law that for a party to succeed in contempt proceedings, the Applicant has the burden to prove the terms of the order were unambiguous and binding onto the Respondent and that the actions of the Respondent are in clear violation of the terms of the orders. Given that contempt of court orders seek the imprisonment of a party and denial of liberty of the person, the Applicant cannot wish away the duty to prove beyond a shadow of doubt the requirements expected of him. The criminality of punishing a party for disobeying a court order places a greater burden on to the Applicant to prove to court that despite the party being fully aware of the orders, he or she chose to disobey and for that reason should be punished. The evidence adduced by the applicant in this case does not lead this court to make a finding that the Respondent is in contempt of the orders issued on 18th May, 2021.

33.In light of the above observations, I find no merit in the Plaintiff's application dated 12th November, 2021 and the same is dismissed. Each party to bear their own costs.

It is so ordered.

Dated, signed and delivered at Chuka this **31st day January, 2022** in the presence of:

C/A: Martha

Gachukia h/b for Ms. Mutegi for Plaintiff

Miss Kungu h/b for Kimakia for Defendant

C. K. YANO,

JUDGE.