



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MIGORI

ELC CASE NO. 020 OF 2021 (O.S)

JOSEPH K. WAKIAGA (Suing on own behalf and as the legal rep. of the estate of APOLLO

ABRAHAM WAKIAGA (Deceased).....1ST PLAINTIFF/APPLICANT

TIMOTHY N. WAKIAGA.....2ND PLAINTIFF/APPLICANT

JAMES M. WAKIAGA.....3RD PLAINTIFF/ APPLICANT

VERSUS

DANIEL OTIENO OJWELU.....1ST DEFENDANT/ RESPONDENT

COUNTY LAND REGISTRAR.....2ND DEFENDANT/ RESPONDENT

HON. ATTORNEY GENERAL.....3RD DEFENDANT/ RESPONDENT

RULING

A. INTRODUCTION

1. By Notice of Motion dated 30th September, 2021 the Applicants/Defendants sought for the following orders: -

a) Spent.

b) This Honourable Court be pleased to order for punishment of the 1st Defendant/ Respondent by ordering for attachment of his property and his detention in prison for a term of Six Months for disobeying this Honourable Court's Order dated 17th August 2021.

c) The Defendant be condemned to pay the costs of this Application.

2. The application is based on the grounds thereof and the Supporting Affidavit sworn by JOSEPH K. WAKIAGA on 30.09.2021. The applicants herein aver that this honourable court issued interim order on 17.08.2021 of status quo on the suit land L.R. SUNA WEST/ WASWETA II/115 now subdivided into L.R NO. SUNA WEST/ WASWETA II/6639,6640, 7477 and 7478.

3. The Applicants further states that the said Orders were duly served upon the Defendants/ Respondents on the 24th August, 2021 and he was therefore fully aware of the existence of the said orders.

4. However, despite being served with the said orders and having knowledge of the same; the 1st Defendant DANIEL OTIENO OJWELU in utter breach of the said orders restrained the Plaintiffs and their workers from using the suit land and went further to threaten to alienate the said suit property.

5. It is their position that the actions of the 1st Defendant amounts to contempt of court and have caused and continue to cause them substantial loss and thus he should be punished for the blatant disobedience of the valid court orders.

6. The application was unopposed. The 1st Respondent despite being served with the Application herein neither filed a response nor

submissions in response to the allegations made against him.

7. The Applicants filed submissions which I have read and considered and I have taken the same into account in arriving at my decision.

B. ANALYSIS AND DETERMINATION

8. I am of the considered view that the sole issue arising for determination in the present Application is Whether the Application dated 30/09/2021 is merited and the 1st Defendant/ Respondent is guilty of disobeying court orders.

9. Contempt is defined in the *Black's Law Dictionary* as;

" Contempt is a disregard of, disobedience to, the rules, or orders of a legislative or judicial body, or an interruption of its proceedings by disorderly behavior or insolent language, in its presence or so near thereto as to disturb the proceedings or to impair the respect due to such a body."

10. Further, In *Halsbury's Laws of England* it is stated: -

"It was the plain and unqualified obligation of every person against or in respect of whom an order was made by a court of competent jurisdiction to obey it unless and until it was discharged and disobedience of such an order would as a general rule result in the person disobeying it being in contempt and punishable by committal or attachmentan application to court by him not being entertained until he had purged his contempt"

11. In **Econet Wireless Kenya Ltd vs Minister for Information & Communication of Kenya & Another, Ibrahim J** (as he then was) in addressing the issue on contempt made the following sentiments: -

"It is essential for the maintenance of the Rule of Law and order that the authority and the dignity of our Courts are upheld at all times. The Court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors. It is the plain and unqualified obligation of every person against or in respect of whom, an order is made by Court of competent jurisdiction, to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or void."

12. I have carefully considered the Application, the Supporting Affidavit together with the annexures thereto and the allegations made therein. On a perusal of the court record, I indeed confirm that this court gave its Order dated 17.08.2021 and issued on 18.08.2021 which read in part that;

*"that the parties herein to maintain obtaining status quo in respect of the suit land **L.R. NO. SUNA WEST/ WASWETA II/115** measuring 3 acres now subdivided into **L.R. NO. SUNA WEST/ WASWETA II/6639,6640,7477 and 7478**. In particular, the Respondent shall not subdivide, transfer, sell, charge, alienate the same or any portion thereof or erect permanent structures or displace or evict the Applicants therefrom pending the interpartes hearing and determination of the Application.... (emphasis mine)*

13. It is therefore not in dispute that this court ordered that the status quo in relation to suit parcel **L.R. NO. SUNA WEST/ WASWETA II/115** now subdivided into **L.R. NO. SUNA WEST/ WASWETA II/6639,6640,7477 and 7478** be maintained. Orders issued by the court should be obeyed and honored unless and until the said orders are set aside or discharged, which has not been the case in the present proceedings.

14. Despite being served with the Application, the 1st Respondent did not file any response or submissions to rebut the allegations made by the Applicants.

15. The elements to be proved in contempt proceedings were discussed in the South African case of **Kristen Carla Burchell vs Barry Grant Burchell** where it was held that in order to succeed in civil contempt proceedings, the applicant has to prove;

(i) *the terms of the order,*

(ii) *Knowledge of these terms by the Respondent,*

(iii) *Failure by the Respondent to comply with the terms of the order.*

Upon proof of these requirements the presence of willfulness and bad faith on the part of the Respondent would normally be inferred...

(See also **Charity Mpano Ntiyione vs China Communications Construction Company Limited & National Environment Management Authority [2017] eKLR**)

16. On a perusal of the Application, the Affidavit in support and the annexures therein and I am satisfied that there was indeed a willful disobedience of the active court orders. This court has reproduced the terms of the order in question above, there is proof of service upon the 1st Respondent/Defendant at his home at Nyamanga Primary School vide an Affidavit of Service sworn by Walter Juma Opiyo on the

20.09.2021 and filed on even date thus signifying knowledge of the terms of the said Order. However, despite there being proper service of their said order, the 1st Respondent has blatantly refused, neglected and ignored the terms of the said order by willfully interfering with the Applicants use and possession of the suit property as stated above. The actions of the 1st Respondent amount to willful disobedience of a valid court order.

17. In view of the above, I find that the Applicants have satisfactorily proved that there was indeed contempt of court orders to the required standard and further hold that the 1st Respondent/ Defendant is in contempt of the court orders issued on the 17.08.2021.

CONCLUSION

18. The upshot of the above, I accordingly find that the Application dated 30th September, 2021 is merited and I proceed to issue a stern warning to them and further direct him to pay a fine of Kshs. 20,000/= and in default to serve one (1) month imprisonment. Costs of the Application to the Applicants.

DATED, SIGNED and DELIVERED in open court at **MIGORI** on **19TH** day of **JANUARY, 2022**.

MOHAMMED N. KULLOW

JUDGE

Ruling delivered in the presence of:-

_____ for the Applicants

_____ for the 1st Respondent

_____ for the 2nd & 3rd Respondents

Tom Maurice - Court Assistant