



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAKAMEGA

ELCC No. 279 OF 2017

AMOS SHIKOMERA NDAKWA.....PLAINTIFF

VERSUS

SAMUEL ODHIAMBO LUMBASI.....DEFENDANT

RULING

1. Judgment was delivered in this matter on 19th February 2020 by N.A. Matheka J in favour of the plaintiff as follows:

I find the plaintiff has proved his case on a balance of probabilities and I grant the following orders;

(c) An order of permanent injunction be issued to restrain the defendant whether by himself, his servants, agents, heirs and personal representatives from trespassing onto, grazing cattle, interfering with, tilling, constructing, disposing off or in other manner dealing with the parcel of land known as S/Kabras/Shamberere/3609.

1. No orders as to costs.

2. Subsequently, the plaintiff filed Notice of Motion dated 18th October 2021 seeking the following orders:

1. THAT this Honourable court be pleased to cite the Defendant/Respondent SAMUEL ODHIAMBO LUMBASI punish him to serve a jail term not exceeding six (6) months for contempt of court for blatant disregard of the Honourable Court's Orders made on 19th February 2020 and 16th November 2017 respectively to

2. THAT the In charge INGAVIRA POLICE PATROL BASE to enforce and implement the Court Order

3. THAT the costs of this application be provided for.

3. The application is supported by an affidavit sworn by the plaintiff. He deposed that the court made an order on 16th November 2017 and issued a decree on 19th February 2020 which were served upon the defendant on 15th July 2019 and again on 2nd September 2021. He annexed affidavits sworn by a process server by the name Habil Juma Wanyama and added that the defendant has disobeyed the orders by continuing with trespass, cutting barbed wire and destroying crops on the suit property. He annexed copies of the order, decree, affidavits of service and non-colour photographs.

4. Although served with the application, the defendant neither filed a response nor attended the hearing. Counsel for the applicant urged the court to allow the application.

5. I have considered the application and the material on record. An allegation of contempt of court is a serious matter. It puts the liberty and or property of the alleged contemnor at serious risk. It follows therefore that the standard of proof facing an applicant in an application such as the present one is higher than the usual one in civil proceedings of proof on a balance of probabilities. See **Mutitika vs. Baharini Farm Limited [1985] KLR 229.**

6. Further, for an application seeking to cite and punish a litigant for contempt to succeed, the applicant must demonstrate wilful disobedience, by the respondent, of the subject order. The order itself must be clear enough as to leave no doubt as what is to be done or refrained from. The Court of Appeal reiterated these requirements in **Micheal Sistu Mwaura Kamau v Director of Public Prosecutions & 4 others [2018] eKLR.**

7. Every court has inherent power and duty to ensure that its process is not abused and that its authority and dignity is upheld at all times. See **Woburn Estate Limited v Margaret Bashforth [2016] eKLR** and **Kiru Tea Factory Company Ltd v Stephen Maina Githiga & 14 others [2019] eKLR**.

8. The record herein shows that through the judgment delivered on 19th February 2020, the court restrained the defendant as well as his servants, agents, heirs and personal representatives from trespassing onto, grazing cattle, interfering with, tilling, constructing, disposing off or in other manner dealing with the parcel of land known as S/Kabras/Shamberere/3609.

9. The record further shows that on 16th November 2017, the court (N.A. Matheka J) delivered a ruling granting the following orders:

1. THAT pending hearing and final determination of the main suit herein an order of temporary injunction do issue restraining defendant/respondent whether by himself, his servants, agents, heirs and personal representatives from trespassing onto, grazing cattle, interfering with, tilling, constructing, disposing off or in other manner dealing with the parcel of land known as S/KABRAS/SHAMBERERE/3609.

2. THAT the costs of this application be to the applicant.

10. It will be noted that the orders of 16th November 2017 were interlocutory in nature. The suit has since been concluded.

11. The applicant has alleged that the that the defendant has continued with trespass, cutting barbed wire and destroying crops on the suit property. No details have been offered as to the specific dates when the alleged contemptuous activities took place. The photographs which are annexed are black and white photocopies thus making it difficult for the court to discern anything meaningful from them.

12. Although the application has not been opposed, the higher standard of proof cast upon the applicant must be met. I find that the materials placed before the court have not assisted the applicant in discharging the burden of proof cast upon him. He needed to be more specific as to the dates, time and scope of the alleged violations.

13. In view of the foregoing, Notice of Motion dated 18th October 2021 is bereft of merit. I dismiss the application with no order as to costs.

Dated, signed and delivered at Kakamega this 18th day of January 2022.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

No appearance for the plaintiff/applicant

No appearance for the defendant/respondent

Court Assistant: E. Juma