



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAKAMEGA

ELCC No. 376 OF 2014

STEPHEN MURUNGA SIUNDU.....PLAINTIFF

VERSUS

RIDAH ALIVITSA

MARY LUNGAHL.....DEFENDANTS

RULING

1. This ruling is in respect of the plaintiff's Notice of Motion dated 22nd October 2021. The following orders are sought in the application:
 - a) *[Spent]*
 - b) *THAT the 2nd respondent herein MARY LUGAHI together with her assignee and or relatives Hesborne Onzere Magomere be cited for contempt of court and be imprisoned for a period not exceeding six (6) months and/or have their property attached and sold.*
 - c) *THAT the nappier grass planted on land parcel No. Maragoli/Viyalo/1683 by the 2nd respondent herein MARY LUGAHI together with her assignee and or relative Hesborne Onzere Magomere be uprooted.*
 - d) *THAT the officer commanding KILINGILI police station to ensure enforcement of the orders issued hereinabove.*
 - e) *THAT costs of this application be provided for.*
2. The application is supported by an affidavit sworn by the plaintiff. He deposed that he obtained a decree in this matter and that the decree was "effected" upon the respondents. That the second defendant and her brother Hesborne Onzere Magomere have returned to his land and planted nappier grass without his consent. He added that the two have become violent and have threatened to continue with their said activities.
3. The applicant availed evidence of service of the application upon the defendants. That notwithstanding, the defendants neither filed a response nor attended court at the hearing of the application. The applicant relied entirely on the material on record and urged the court to allow the application.
4. I have considered the application. The applicant wishes to have the second defendant and one Hesborne Onzere Magomere cited and punished for contempt of court.
5. In a modern society governed by the rule of law, court orders hold a special place by facilitating a just and orderly conduct of affairs. It is therefore axiomatic that every person against whom an order is made by a court of competent jurisdiction and who has been made aware of such an order has a duty to obey it unless and until it is discharged. That requirement is non-negotiable. A party cannot choose the scope and manner of his compliance. See **Fred Matiang'i the Cabinet Secretary, Ministry of Interior and Co-ordination of National Government v Miguna Miguna & 4 others [2018] eKLR.**
6. Given the central role of court orders and the attendant consequences of breach, an allegation of contempt of court is a serious matter since if proven, the liberty and property of the contemnor are at risk. In view of the gravity of such an allegation and the potential consequences, the standard of proof in contempt proceedings 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.**

7. Thus, an applicant seeking to have another litigant punished for alleged contempt of court must demonstrate wilful disobedience. So as to be sure that there has been wilful disobedience, the order said to have been disobeyed must be clear enough as to leave no doubt regarding what is to be done or refrained from. See **Micheal Sistu Mwaura Kamau v Director of Public Prosecutions & 4 others [2018] eKLR.**

8. The record herein shows that judgment was delivered on 2th October 2018 in favour of the plaintiff/applicant as follows:

1. A declaration that the plaintiff/applicant is the owner of the portion of land parcel No. LP N/MARAGOLI/VIYALO/1682 and KAK/VIYALO/1683 being a subdivision of LP N/MARAGOLI/VIYALO/1369 having lived on, occupied and used the said parcel of land from 1953 to-date and the applicant is hence entitled to the said portion of land by virtue of adverse possession and the respondent is ordered to transfer title to the said parcel of land to the applicant.

2. A declaration that the respondents are is holding title to land parcel No. LP N/MARAGOLI/VIYALO/1682 and KAK/VIYALO/1683 being a subdivision of LP N/MARAGOLI/VIYALO/1369 in trust for the applicant and the respondents are ordered to transfer title to the said portion of land to the applicant and in default of the respondents transferring the same voluntarily the Deputy Registrar to execute all the documents necessary to effect the transfer of title to the aforesaid parcel of land into the name of the applicant.

3. The respondents to pay the costs of this originating summons to the applicant.

9. The record further shows that following delivery of the judgment, the court ordered on 12th March 2020 that the defendants be evicted from the suit properties and that their structures thereon be demolished. From the material availed by the applicant, it is apparent that the orders of 12th March 2020 were enforced. Among the material that the plaintiff had placed before the court to lay a basis for the orders were copies of titles demonstrating that in line with the judgment, he became registered proprietor of the suit properties on 14th May 2019.

10. In the present application, the applicant has not stated the date when the second defendant and Hesborne Onzere Magomere planted nappier grass on the suit properties. That small detail is important because the court needs to know whether the planting was done after the judgment. Further, I note that Hesborne Onzere Magomere is not a party to this suit. Nothing has been availed to show that he was served with the order he is being accused of disobeying.

11. Finally, the decree in this matter merely conferred ownership of the suit properties on the plaintiff. The decree has since been enforced and the plaintiff is now the registered owner. On the other hand, the orders of 12th March 2020 were for eviction of the defendants from the suit properties and demolition of their structures. Neither the decree nor the orders of 12th March 2020 specifically required the second defendant and Hesborne Onzere Magomere to do or refrain from doing anything in connection with the use of the suit properties. If the plaintiff's complaint is that the second defendant and Hesborne Onzere Magomere have planted nappier grass on the suit properties, the plaintiff is now the owner of the properties and he does not need a court order to remove the said grass. The plaintiff should settle down on the suit properties and desist from making unnecessary applications in this concluded matter.

12. In view of the foregoing discourse, the plaintiff has failed to establish any wilful disobedience of the orders herein either on the part of the second defendant or Hesborne Onzere Magomere. The higher standard of proof required in an application seeking to cite a party for contempt of court has not been met. In the result, Notice of Motion dated 22nd October 2021 is dismissed. Since the application was not opposed, I make 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:

The Plaintiff in person

No appearance for the 1st Defendant

The 2nd Defendant in person

Court Assistant: E. Juma