



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

ENVIRONMENT AND LAND CIVIL CASE NO. 94 OF 2008

PHILIP OLALI OCHARO.....PLAINTIFF

VERSUS

MESHACK OTEWE AGWENA.....DEFENDANT

AND

SALOME ATIENO OTEWE.....INTERESTED PARTY

RULING

1. What is before me is the plaintiff's application that was brought by way of Notice of Motion dated 25th June 2012 in which the plaintiff is seeking an order to commit the defendant to civil jail for disobeying this court's order of temporary injunction made on the 27th day of November 2008. The plaintiff's application is supported by the affidavit of the plaintiff sworn on 25th June 2012. In his affidavit, the plaintiff has deposed that on 27th November, 2008 this court issued an order of temporary injunction in his favour restraining the defendant either by himself or through his agents, servants and/or employees from trespassing, interfering, entering, cultivating or in any other manner whatsoever dealing with all that parcel of land known as **LR. No. North Sakwa/ Kamasoga/1253** (hereinafter referred to as "the **suit property**") pending the hearing and determination of this suit.

2. The plaintiff has deposed that the said order was extracted, endorsed with a penal notice and served personally upon the defendant on the 10th day of December 2008. The plaintiff has stated that, on 2nd October 2011, the defendant entered the suit property and harvested sugarcane that was growing thereon without the plaintiff's permission and in utter disregard and disobedience of the said court order. The defendant also proceeded to plant maize on the lower portion of the suit property. The plaintiff has contended that the defendant's actions aforesaid amount to disobedience of a lawful court order and as such deserves to be punished accordingly so as to maintain the dignity of the court.

3. The plaintiff's application is opposed by the defendant through a replying affidavit sworn on 3rd September 2012. The defendant has deposed that since the issuance of the court order of 27th November 2008, he has never entered the suit property. The defendant has claimed that the instant application is aimed at intimidating him so that he may give up on his claim over the property in dispute. The defendant has contended further that the subject application is pegged on falsehood which is intended to mislead the court into sending him to jail so that his family may be left hopeless and miserable. He has contended that he is currently in occupation and use of a parcel of land known as **LR No. North Sakwa/Kamasoga/1252** (hereinafter referred to as "**Plot No. 1252**") which shares a common boundary

with the suit property. The defendant has contended that contrary to the plaintiff's allegations, he has observed the said court order at all times. The defendant has contended that the photographs marked as exhibit "P004" to the plaintiff's affidavit have no probative value since no one can tell the location from which the same were taken thus the authenticity of the same cannot be vouched or verified. The defendant has contended that the plaintiff is ill bent on ensuring that he is subjected to maximum pain and suffering. He has termed the plaintiff's application as oppressive.

4. The plaintiff's application came up for hearing before me on 9th June 2014 when it was agreed between the advocates representing the parties that the same be argued by way of written submissions. Both parties filed their respective submissions and I have duly considered the same. The law on contempt of court is now fairly well settled. The onus was upon the plaintiff to prove the elements of contempt complained of. The proof must be above a balance of probability but not beyond any reasonable doubt. See, the holding in the Court of Appeal case of **Mutitika –vs- Baharini Farm Ltd [1985]KLR 227**, where the court stated that the standard of proof in contempt proceedings must be higher than proof on a balance of probabilities and almost but not exactly beyond reasonable doubt. The plaintiff had a duty to prove that; the court did issue an order of injunction restraining the defendant from trespassing, interfering, cultivating, constructing and/or in any other manner whatsoever dealing with suit property pending the hearing and determination of the suit, the said order was extracted and served upon the defendants, the order had a penal notice warning the defendant that if he disobeyed the same he would be liable to be punished by the court and, the defendant did disobey the said order after such service.

5. The plaintiff annexed to his affidavit a copy of the court order that was made on 27th November 2008 which the defendant is accused of disobeying. The said order had a penal notice. The plaintiff also annexed photocopies of photographs said to have been taken on the suit property showing how the defendant had contravened the said order by interfering with the suit property through harvesting of sugarcane and growing of maize thereon. Service of the said court order was not denied by the defendant. The defendant acknowledged the fact that the said court order was indeed issued. What the defendant has contested is his alleged breach of the said order. The defendant has contended that he is occupying and using land Plot No. 1252 which shares a common boundary with the suit property. This fact was not contested by the plaintiff. The defendant has contended that the activities complained of by the plaintiff are restricted to Plot No. 1252. In view of the position taken by the defendant, I am of the opinion that it was important for the plaintiff to place evidence before the court showing where the exact boundary between the suit property and Plot No. 1252 lies and then proceed to demonstrate that the defendant crossed the boundary line between the two properties, entered the suit property and harvested sugarcane that was growing thereon and also planted maize. In the absence of any indication as to where the boundary between the suit property and Plot No. 1252 lies, it is difficult to determine whether the defendant has breached the court order issued herein on 27th November 2008.

6. Due to the foregoing, I am not convinced that the defendant breached the order that was issued by this court on 27th November 2008. The plaintiff has not proved beyond a balance of probability that the defendant harvested sugarcane from and also planted maize on the suit property, as opposed to Plot No. 1252. In the absence of clear evidence of contempt, the plaintiff's application cannot succeed. For the foregoing reasons, the application dated 25th June 2012 is dismissed with costs to the defendant.

Delivered, signed and dated at KISII this 20th day of February, 2015.

S. OKONG'O

JUDGE

In the presence of:-

Mr. Bigogo h/b for Oguttu for the plaintiff

N/A for the defendant

N/A Interested party

Mr. Mobisa Court Clerk

S. OKONG'O

JUDGE