



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAROK

ELC CASE NO. E006 OF 2021 (OS)

JOHN S. OLE MAITAI.....APPLICANT/PLAINTIFF

-VERSUS-

KOITAAT OLE SAITIEU.....RESPONDENT/ DEFENDANT

RULING

1. Before this court is a Notice of Motion application dated 23rd July, 2021 and brought under **Order 40 Rule 3 (1) of the Civil Procedure Rules** and **Section 3 and 3A** of the **Civil Procedure Act** seeking the following prayers: -

1. Spent.

2. That this honourable court be pleased to penalize the respondent/defendant (Koitaat Ole Saitieu), given on the 6th July, 2021 by his committal to civil jail for a period of six months.

3. That the respondent/defendant do compensate the plaintiff/applicant for damages arising out of the acts of contempt.

4. That the defendant/respondent do bear the costs of this application.

2. The application is premised on the grounds on the face of it and is supported by the affidavit of the applicant herein John S. Ole Maitai sworn on 23rd July, 2021. The applicant deposes that on 6th July, 2021 this honourable court issued orders against the respondent which orders were clear and concerned plot number Narok/Cis/Mara-Olorropil/899 which is the suit land. That since then, the respondent has been acting in total disobedience of the court orders by spraying standing pasture and crops on the suit land with herbicides, violently stopping the applicant from utilising the land, outright threats of bodily harm and intimidation, purporting to transfer a share of the suit land to another so that there can be two proprietors on the suit land and further purporting to lease out the land to willing individuals and grazing livestock on the suit land leading to destruction.

3. The applicant further deposes that the purpose of this act is to ensure that all the evidence he intends to rely on is destroyed and unless this court acts fast, the applicant is apprehensive that the next action would be to demolish his houses which would be detrimental to himself and his family. The applicant contends that when he sought the orders, the purpose was for preservation of the evidence he intends to rely on in the case. It is the applicant's contention that unless this honourable court moves fast in penalizing the respondent, he will never prepare the land for planting in good time or at all.

4. The application is opposed by the respondent vide his replying affidavit sworn on 14th September, 2021. The respondent deposes that the applicant's averment in paragraphs 2,3 and 4 of the supporting affidavit are untrue, misleading and geared at obtaining the court's sympathy. That the applicant flouted the court's directions issued with respect to the Originating Summons application dated 21st May, 2021 with the sole reason of obtaining ex-parte orders. That the pleadings including the court order was never served upon him and he became aware when his advocates on record perused the court file. That being in possession of the suit land, the court could not have issued the orders stopping him from utilising the land since he grazes animals thereon and the land is his home and source of live hood. That the orders which the applicant seeks to enforce appear as final orders that would render the respondent and his family homeless despite him being the legitimate owner and the person in use of the property.

5. The respondent further deposes that he filed an application on 16th July, 2021 seeking review of the said orders since the same were obtained through misrepresentation and concealment of material facts which if it were brought to the attention of the court, it would have reached a different opinion. That the applicant has not established the required standard of proof that the respondent is in contempt and therefore no cause of action can arise from the pleadings. That the application is bad in law as it breaches the rules of contempt proceedings and as such the application if allowed would prejudice him, occasion great injustice by locking him out of his home and subject him to irreparable harm, ridicule and damage.

6. The applicant filed a further affidavit sworn on 1st September, 2021 in which he deposed that the respondent contravened the orders of the court which were issued on 6th July, 2021 and moved ahead and purported to take possession of the suit land using threats of bodily harm and intimidation. That the respondent has brought tractors and the land is ploughed and irish potatoes planted. The applicant deposes that he has been in occupation of the suit land since 1980's and he wanted the court to preserve his evidence in support of the Originating Summons which the respondent is destroying. As such the applicant should be compensated for loss of use of the land which he claims the respondent is in use about twenty acres.

7. The applicant filed written submissions dated 25th October, 2021. On whether service was properly effected, the applicant submits that the orders were injunctory and very specific. That a return of service sworn on 2nd September, 2021 is clear that the defendant was properly served. That in fact, a look at paragraph 6 of the respondent's supporting affidavit to his application dated 16th July, 2021, confirms proper service was effected. That it is proof enough that the respondent was properly served owing to the fact that the respondent filed an application for setting aside of the orders.

8. On whether the respondent has engaged in acts of contempt and disobedience of court orders, the applicant further submits that he has demonstrated in his supporting affidavit the respondent's action on the suit land. The applicant further submits that the annexed photographs in his application indicate that the respondent went ahead and cultivated the land which acts have not been refuted by the respondent. That the occupation of the land by the respondent is an admission of entry to the suit land contrary to the court orders issued on 6th July, 2021. He relies on the case of **Nabro Properties versus Sky Structures Limited & 2 Others [2002] eKLR**. The applicant submits that the orders that the respondent disobeyed were ex-parte since despite being given a chance to defend the application, the respondent failed to do so. The applicant relies on the case of **Teachers Service Commission versus Kenya National Union of Teachers & 2 Others [2013] eKLR** and the English case of **Hadkinson versus Hadkinson (1952) ALL ER 567** where the court stated as follows: - **"It's the plain and unqualified obligation of every person against or in respect of whom an order is made by a 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 even void"**.

9. The respondent filed written submissions dated 15th November, 2021. He submits that the application is totally misconceived, lacks merit and does not disclose any form of contempt. He further submits that the standard of proof required for contempt proceedings was set out in the case of **Katsuri Limited versus Kapurchand Depar Shah [2016] eKLR** where the court held that **"Contempt of court is criminal and it must be proved that one has actually disobeyed the court order before one is cited for contempt the applicant must prove beyond per adventure that the respondent is guilty of contempt"**.

10. The respondent submits that to succeed in civil contempt proceedings, the applicant is duty bound to prove that the terms of the order were clear and unambiguous and were binding on the defendant, that the defendant has knowledge of or proper notice of the terms of the order, also, that the defendant has acted in breach of the terms of the order and the defendant's conduct was deliberate.

11. The respondent submits that the orders alleged to have been defied have expired and therefore not capable of enforcement as is provided under **order 40 rule 4 (3) of the Civil Procedure Rules**. That from the affidavit of service sworn on 16th July, 2021, the process server deposed that he received the orders dated 6th July, 2021 on 12th July, 2021 to effect service upon the respondent. For this reason the ex-parte orders sought had already lapsed and there were no orders in force. The respondent relies on the case of **Esther Kakonyo Wanjohi versus Julian Wambui Gakuru [2018] eKLR**.

12. I have considered the notice of motion application, relevant replies thereof and the written submissions filed by both parties and in my view, the issue for determination is whether the orders sought in application can be granted.

13. **The Black's Law Dictionary (Ninth Edition)** defines contempt of Court as: -

"Conduct that defies the authority or dignity of a Court. Because such conduct interferes with the administration of justice, it is punishable usually by fine or imprisonment."

14. The law guiding the present Application is **Order 40 Rule 3(1) of the Civil Procedure Rules** which stipulates as follows: -

In cases of disobedience, or of 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.

15. This application for contempt arises out of alleged disobedience of the orders issued by this court on 6th July, 2021. The applicant has mentioned in his supporting affidavit acts occasioned by the respondent on the suit land which is in contravention of the orders issued herein. The applicant claims that the plant and crops were sprayed, that the land was tilled and he received threats of bodily harm and intimidation. The applicant relies on photographs annexed to his supporting affidavit. However, this court is unable to substantiate the claims of the applicant. For example, the applicant claims threats of bodily harm and intimidation. He has not availed evidence showing that he reported the threats to the police. The applicant has not adduced any evidence of the crops that were allegedly interfered with. This court cannot tell when and where the photographs annexed were taken. They only remain just photographs. On the other hand, the respondent has dismissed the applicant's claim as false, untrue and misleading. He has not denied the photographs taken in the picture. He claims that the orders sought by the applicant appear final and which in my opinion he seems hell bent on complying with.

16. The Supreme Court of Kenya in **Republic v Ahmad Abolfathi Mohammed & Another [2018] eKLR** held that;

The power, to commit a person to jail, must be exercised with utmost care, and exercised only as a last resort. It is of utmost importance, therefore, for the Respondents to establish that the alleged contemnor's conduct was deliberate, in the sense that he

or she willfully acted in a manner that flouted the Court Order 9 (emphasis mine).

17. I have perused the affidavit of service sworn on 16th July, 2021. The process server deposed that on 12th July, 2021, he received copies of an order given on the 6th July, 2021 from Emmanuel Maitai to effect service on the respondent. He deposed that he effected service on the same day. **Order 40 rule 4 (3) of the Civil Procedure Rules** provides: - **'In any case where the court grants an ex parte injunction the applicant shall within three days from the date of issue of the order serve the order, the application and pleading on the party sought to be restrained. In default of service of any of the documents specified under this rule, the injunction shall automatically lapse'.**

18. The orders were issued on 6th July, 2021. Failure to serve the order would mean that the injunction automatically lapsed after 3 days and in this case on 9th July, 2021. An order that has lapsed cannot be the basis upon which any contempt proceedings can be found.

19. Based on the foregoing, I find that the notice of motion application dated 23rd July, 2021 lacks merit and the same is dismissed with no orders as to costs. It is so ordered.

DATED, SIGNED AND DELIVERED ON THIS 17TH DAY FEBRUARY, 2022.

Mbogo C.G

Judge

17/2/2022

In the presence of: -

CA: T.Chuma

Plaintiff/applicant present in person

Ms Mogere for the respondent