



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO. 371 OF 2013

WILIAM THENDI MAINA.....PLAINTIF/APPLICANT

-VERSUS-

SAMUEL MUIRURI KAMONDO.....DEFENDANT/RESPONDENT

RULING

INTRODUCTION

1. Vide Notice of Motion Application dated the 15th October 2020, the Plaintiff herein has sought for the following Reliefs;

I.(Spent).

II. The Defendant herein, Samuel Muiruri Kamondo, be committed to civil jail for such period as the Honourable court may deem fit, for having deliberately and without having good reason by disobeying the orders of this court usually issued on the 5th May 2017, and re-issued on the 28th September 2020.

III. Costs of the application be provided for.

2. The subject Application is supported by the affidavit of the Plaintiff/Applicant, namely William Thendi Maina, sworn on the 15th October 2020.

3. Upon being served with the subject Application, the Defendant ultimately responded to the said Application by filing a Replying affidavit sworn on the 3rd February 2022, and in respect of which the Defendant/Respondent has made several averments, *inter-alia* that the suit property, lawfully belongs to himself and that the orders issued by the court, were issued without affording him an opportunity to be heard or at all.

DEPOSITION BY THE PARTIES:

4. Vide the Supporting Affidavit sworn on the 15th October 2020, the Deponent has averred as hereunder;

5. On or about the 27th July 2012, same filed the subject suit against the Defendant/Respondent pertaining to and/or concerning Trespass by the Defendant/Respondent onto the plot known as Plot No. 729, Kware/Ongata Rongai.

6. It has further been averred that upon the filing of the said suit, the dispute between the Plaintiff/Applicant and the Defendant/Respondent, was referred to the county surveyor Kajiado County Government for purposes of determination of the ground position of the suit property and whether the Defendant herein had trespassed onto the suit plot.

7. Further, the deponent has also averred that upon the visitation of the suit plot, the surveyor, Kajiado County Government, filed a Report in court, whose terms confirmed that indeed the Defendant/Respondent, had trespassed onto the suit property.

8. Subsequently, it was averred that the Report by the County Surveyor Kajiado County Government was thereafter subjected to deliberations before the court, namely, Hon. Justice P. Nyamweya, Judge (as she then was) whereupon the court proceeded to and effectively entered judgment on various terms, *inter-alia* eviction of the Defendant/Respondent from the suit plot, as well as an order of Permanent Injunction.

9. It has further been averred that after the issuance of the orders of Eviction, the Defendant/Respondent, was duly evicted from the suit

property, in execution and/or enforcement of the Orders of the court.

10. It has further been averred that despite the Eviction of the Defendant from the suit plot, the Defendant returned onto the suit plot and thereafter reconstructed structures thereon, obviously in Contempt of the court orders.

11. As a result of the actions by and or at the instance of the Defendant/Respondent, the Plaintiff/Applicant avers that same was constrained to revert back to the court and thereafter same sought for and obtained Warrants of Eviction, which were issued on the 22nd March 2017.

12. Be that as it may, it has been averred that despite the various court orders, including the orders of Eviction and Permanent Injunction, the Defendant/Respondent, has remained adamant and is still in occupation of the suit property.

13. Owing to the foregoing, it has been contended that the actions and/or omissions by the Defendant/Respondent are now meant to bring the integrity and reputation of the court to disrepute.

RESPONSE BY THE DEFENDANT/RESPONDENT

14. Upon being served with the Application for Contempt, the Defendant/Respondent filed a Replying Affidavit and in respect of which same has averred as follows;

15. That the suit property, which is claimed by the Plaintiff, lawfully belongs to him and that he has been in occupation thereof since the year 1980's, when one, namely, Nguri, was the Chief of the Area.

16. Besides, the Defendant/Respondent has averred that upon the filing of this suit and despite the fact that same filed his Statement of Defense, same has not been afforded an opportunity to be heard so as to state his case.

17. Further, the Defendant has averred that after his premises were destroyed pursuant to the Eviction orders issued by the court, the Residents of Kware Ongata Rongai, decided to and helped to construct a house for him on the suit property, wherein he continues to live to date.

18. The Defendant/Respondent further averred that he is a senior citizen, currently aged 72 years with pre-existing condition. In this regard, the Defendant/Respondent has stated that it would not be just for him to be committed to jail.

19. In any event, the Defendant avers that he remains in occupation of the suit property in pursuit for justice, to the extent that the land in question is rightfully his.

20. Finally, the Defendant has averred that he is not in contempt of the court or any court orders.

SUBMISSIONS:

21. The subject Application came up for hearing on the 8th February 2022, when same was heard by of short oral submissions.

22. On his part, the Plaintiff/Applicant submitted that upon being granted orders of eviction as well as permanent injunction, vide the ruling rendered on the 8th October 2014, same proceeded to and extracted Eviction orders against the Defendant/Respondent.

23. It was further submitted that the Defendant herein was thereafter evicted from the suit property, but however, same reverted to and/or returned onto the land, irrespective of the orders of the court.

24. In the premises, the Plaintiff has therefore submitted that the actions by the Defendant amounts to contempt or Disobedience of lawful court orders and thus the Defendant ought to be suitably punished.

25. On his part, the Defendant/Respondent, who appears in person relied on Replying Affidavit sworn on the 3rd February 2022, and submitted that the suit plot, wherein he is in occupation is rightfully his.

26. Besides, the Defendant has further submitted that ever since the suit was filed, same has not been afforded an opportunity to be heard, to allow same to prove his rightful claims to the Suit property.

27. Finally, the Defendant/Respondent has submitted that it is true that he remains in occupation of the suit plot and that he is residing thereon to date. Simply put, the Defendant has confirmed his continued occupation and possession of the Suit Property.

ISSUES FOR DETERMINATION

28. Having perused the Notice of Motion Application dated the 15th October 2020, the Supporting Affidavit thereto and the Reply by the Defendant/Respondent and having similarly taken into account the oral submissions, I find the following issues germane for determination;

1. Whether the Defendant herein is knowledgeable and or aware of the court orders issued on the 8th October 2014 and 22nd March 2017, respectively and the import of the said Orders.

II. Whether the terms of the said orders are clear and unequivocal.

III. Whether the Defendant/Respondent has breached and/or violated the said orders

ANNALYSIS AND DETERMINATION

ISSUES NUMBERS 1 & 2

Whether the Defendant herein is knowledgeable and or aware of the court orders issued on the 8th October 2014 and 22nd March 2017, respectively and the import thereof.

Whether the terms of the said orders are clear and unequivocal.

29. Upon the filing of the subject suit, the issue in dispute was referred to the County Surveyor Kajiado County Government, with a view to determining the ground position and/or placement of the suit plot and whether the Defendant/Respondent herein, had trespassed onto the suit property.

30. Following the reference of the dispute to the County Surveyor Kajiado County Government, same undertook the survey works and thereafter prepared a Survey Report which was filed in court.

31. Subsequently, the Honourable court invited the parties herein, namely, the Plaintiff/Applicant and the Defendant/Respondent to make submissions and/or comments on of the report, whereupon the parties herein indeed made submissions before the court, each stating his position as far as ownership and location of the suit property is concerned.

32. After entertaining comments and/or submissions from the parties, Lady Justice P. Nyamweya, Judge, (as she then was), proceeded to and found in favor of the Plaintiff/Applicant vide ruling rendered on the 8th October 2014.

33. Suffice it to say, that the terms of the Ruling were known to both the Plaintiff and the Defendant, who were both present at the time of the delivery of the said ruling.

34. On the other hand, it is important to note that after the delivery of the ruling, the plaintiff proceeded to, extracted and thereafter executed the orders of eviction, whereupon the Defendant was evicted from the Suit Property.

35. From the foregoing, it is clear that the Defendant/Respondent was privy to, knowledgeable of and thus conversant with the terms of the Orders of the court. In this regard, there is no dispute as to knowledge that the said orders existed.

36. Notwithstanding the foregoing, it is also imperative to note that the terms and tenor of the court orders in question, were similarly clear and explicit, that is, in terms of what the Court Orders expected to be Done. For clarity, the Court Orders were obvious and devoid of ambiguity.

37. In short, I conclude by stating that the Defendant was duly aware and knowledgeable of the terms of the orders of the court and similarly same was aware of the import and tenor thereof.

38. In support of the contention that knowledge and/or awareness of the order, would be sufficient to enable a party to heed and/or comply with the terms thereof, it is worthy to take note of the decision in the case of **Executive Committee Kisii County & 2 others v Masosa Construction Limited & another [2020] eKLR**, where the Court of Appeal observed as hereunder;

In Justus Kariuki Mate –v- Martin Nyaga Wambora, [2014] eKLR this Court acknowledged the move from the position that an order endorsed with a penal notice must be personally served on a person before contempt can be proved. Lenaola, J (as he then was) in the case of Basil Criticos -v- Attorney General [2012] eKLR perceived an additional ground for dispensation with the requirement for personal service;

“...where a party clearly acts and shows that he had knowledge of a court order, the strict requirement that personal service must be proved is rendered unnecessary”.

Similarly, the requirement of notice of the prohibitory judgement or order would also be satisfied where a party is represented counsel who was present in court when the orders were made.

Therefore, knowledge of the judgment or order by an alleged contemnor’s advocate suffices for contempt proceedings. There is a presumption that when an advocate appears in court on instructions of a party, it behoves him to report back to the client all that transpired in court that has a bearing on the client’s case.

This presumption is in line with the dicta of the Canadian Supreme Court in the case of Bhatnager - v- Canada, (Minister of Employment and Immigration 1990) 2 SCR 217 where it was held that a finding of knowledge on the part of the client may be inferred from the fact that the solicitor was informed.

Similarly, in the United States case of United States –v- Review 834 F.2d 1198, 1203 (5th Cir. 1987) it was held that a defendant

had adequate notice of a show cause order because his attorney was on notice. (See also Kenya Supreme Court dicta in Justus Kariuki Mate & another –v- Martin Nyaga Wambora & another [2017] eKLR).

ISSUE NUMBER 3:

Whether the Defendant/Respondent has breached and/or violated the said orders

39. Having found and held that the Defendant/Respondent was aware and/or knowledgeable of the court orders of eviction and permanent injunction, same had unqualified obligation to adhere to and/or comply with the terms of the aforesaid orders.

40. For clarity, the nature and extent of the obligation of a party towards respecting and/or complying with court orders was underscored in the decision in the case of **HADKINSON v. HADKINSON** [1952] ALL E.R. 567, in which **Romer, L.J. said at p.569-**

“It is the plain and unqualified obligation of every person against, or in respect of whom, an order is made against 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. LORD COTTENHAM, L.C., said in CHUCK v. CREMER (1846) 1 Coop. temp. Cott. 342:- ‘A party, who knows of an order, whether null or valid, regular or irregular, cannot be permitted to disobey it...

It would be most dangerous to hold that the suitors, or their solicitors, could themselves judge whether an order was null or valid – whether it was regular or irregular. That they should come to the court and not take upon themselves to determine such a question. That the course of a party knowing of an order, which was null or irregular, and who might be affected by it, was plain. He should apply to the court that it might be discharged. As long as it existed it must be obeyed.”

41. In respect of the subject matter, the Defendant/Respondent may not be agreeable with the terms of the court order and essentially the declaration that the suit property belongs to the Plaintiff/Applicant and that same was found to be in trespass, but the dictates of the law demand that he must respect the orders of the court.

42. At any rate, the orders which were issued by the court on the 8th October 2014, essentially, Orders of Eviction and Permanent Injunction, were final orders which could have been appealed against, but was not appealed against. Consequently, the said orders remain vibrant, functional and in existence to date.

43. I must also point out that though I have seen an Application to set aside some of the orders and in particular, the orders of 22nd March 2017, re-issuing warrants of eviction, but it is important to note that the foundation of the orders herein, namely the ruling 8th October 2014, is not capable of being set aside, to the extent that same was made after Inter Partes hearing and thus same is only amenable to Appeal.

44. Having made the foregoing observations, it is now appropriate to determine whether the Defendant/Respondent, has breached and/or violated the terms and tenor of the orders which were issued in respect of the subject matter.

45. To answer the foregoing question, it is worthy to recall the submissions of the Defendant/Respondent, wherein he reiterated that he remains in occupation of the suit property, even after same had hitherto been evicted.

46. Essentially, what the Defendant/Respondent is saying is that he doesn't care about the court orders and for him all that matters is that the suit plot is rightfully his, having commenced occupation thereof in the 1980's.

47. In my humble view, the conduct of the Defendant/Respondent is so brazen, flagrant and deliberate, to an extent that the court orders do not mean and/or signify anything unto the Defendant/Respondent.

48. On the basis of the Defendant's/Respondent's own averments in the Replying affidavit and submissions, it is my finding and holding that the Plaintiff/Applicant has established contempt and/or disobedience of the court orders to the requisite standards.

49. In support of the foregoing observation, all that I need to say, is to adopt and reiterate the holding of the court in case of In **Mutitika v Baharini Farm Ltd**[1985] eKLR, where the court observed as hereunder;

Re Breamblevale Ltd [1969] 3 All ER 1062, Lord Denning MR. (as he then was), at page 1063, had this to say,

“A contempt of court is an offence of a criminal character. A man may be sent to prison. It must be satisfactorily proved. To use the time– honoured phrase, it must be proved beyond reasonable doubt”.

With the greatest possible respect to that eminent English judge, that proof is much too high for an offence “of a criminal character” and, ipso facto, not a criminal offence properly so defined.

“We agree with Mr. Khaminwa’s submissions in this respect. In our view the standard of proof in contempt proceedings must be higher than proof on the balance of probabilities, almost but not exactly, beyond reasonable doubt. We envisage no difficulty in courts determining the suggested standard of proof. The standard of proof beyond reasonable doubt ought to be left where it belongs, to wit, in criminal cases. It is not safe to extend it to offence which can be said to be quasi – criminal in nature Winn LJ on page 1064 was in our view right in saying that the guilt has to be proved”

50. In short, it is my finding and holding that the Defendant/Respondent has disobeyed lawful court orders, without any lawful and reasonable excuse. In any event, the conduct of the Defendant herein exemplifies intentional and deliberate defiance and utter disrespect of the Court Orders.

FINAL DISPOSITION

51. Having addressed and/ or dealt with all the issues enumerated herein before, it is therefore appropriate to render the final orders of the court.

52. In the premises and despite the age of the Defendant, I find and hold that the Notice of Motion Application dated the 15th October 2020, is merited and same be and is hereby allowed.

53. Consequently, the Defendant/Respondent is hereby cited and found to be in contempt of the lawful court orders, which were issued herein, including the orders issued on the 8th October 2014, as well as 22nd March 2017.

54. Owing to the foregoing, the Defendant/Respondent herein shall now be afforded an opportunity to tender mitigation on a date to be set by the court during the rendition and/or delivery of the ruling herein.

55. Finally, cost of the Application be and are hereby awarded to the Plaintiff/Applicant.

56. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 17TH DAY OF FEBRUARY 2022.

HON. JUSTICE OGUTTU MBOYA

JUDGE

In the Presence of;

June Nafula Court Assistant

Mr. Maguta Kimemia for the Plaintiff/ Applicant.

Mr. Samwel Muiruri Kamondo- The Defendant present in Person.