



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT KISUMU

ELC NO. 46 OF 2020

RICHARD OTIENO.....1ST PLAINTIFF/RESPONDENT
JOSEPH OGUTU.....2ND PLAINTIFF/RESPONDENT
PAMELA ATIENO ODHIAMBO.....3RD PLAINTIFF/RESPONDENT
PATRICK OUMA.....4TH PLAINTIFF/RESPONDENT
MILKA OUTA.....5TH PLAINTIFF/RESPONDENT
JOSEPH OGADA.....6TH PLAINTIFF/RESPONDENT
NICHOLAS OTIENO.....7TH PLAINTIFF/RESPONDENT
MONICA AWUOR.....8TH PLAINTIFF/RESPONDENT
GODFREY ONYANGO.....9TH PLAINTIFF/RESPONDENT
PAMELA ATIENO.....10TH PLAINTIFF/RESPONDENT

VERSUS

MICHAEL OTIENO WAGUDE.....1ST DEFENDANT/APPLICANT
THE LAND REGISTRAR, KISUMU.....2ND DEFENDANT

RULING

Brief Facts

The Applicants herein filed a Notice of Motion Application dated 16th December 2021 under Sections 1A, 1B,3,3A, 63 (e) of the Civil Procedure Act, section 5 of the Judicature Act Laws of Kenya seeking for the following orders:

1. That for purpose of the record this Application be certified urgent (spent).
2. That a Temporary Injunction do issue restraining the Respondents, their employees, agents, family, servants and/or whomsoever jointly and severally from selling, transferring, disposing, sub dividing, entering into, or in any other way whatsoever interfering with land parcels Kisumu/Dago/4721 and Kisumu/Dago/4722 being the resultant titles from the original suit parcel No. Kisumu /Dago/ 566 pending the hearing and determination of this application and suit.
3. That an order of committal to civil jail be made against the following for such period as this Honourable mat deem fit and just:
 - a) Michael Otieno Wagude, the 1st Respondent and
 - b) The Land Registrar, Kisumu County, the 2nd Respondent.

4. An order that cost of and occasioned by this Motion be paid by the Respondents.

The Application was based on grounds that this court issued orders of status quo restraining the Respondents from interfering with the suit property Kisumu/Dago/566 and that the said orders were made in the presence of the Respondents and also extracted and served upon the Respondents together with the penal notice. That despite the Respondents having knowledge of the order, they proceeded to sub divide the suit property Kisumu/Dago/566 into Kisumu/Dago/4721 and Kisumu/Dago/4722. That the Applicants are now apprehensive that the resultant titles will be transferred to other 3rd parties which will render the suit nugatory as the Respondents move was intended to defeat justice by destroying the substratum of the suit.

The Application was supported by the Affidavit Richard Otieno who swore on behalf of the Applicants who relied on the grounds in the Notice of Motion and stated that he came to learn of the sub- division when he conducted a routine search on the suit property and was informed that the register was closed upon sub division and new parcels were created being 4721 and 4722. That he purchased the registry index map and confirmed that sub division had taken place.

He stated that he is apprehensive that the resultant titles will be transferred to other 3rd parties which will render the suit nugatory. That court orders must be obeyed and in the event someone is dissatisfied with the order, the aggrieved party can appeal against it or seek its review. That the Respondents are in disobedience of the court order and therefore their actions are contemptuous and punishable only by imprisonment.

The 1st Respondent herein filed grounds of opposition to the Application where he stated that the Applicant is asking the court to sit on an appeal on a matter the court had already pronounced itself in ELC 13 2015. That the court lacks jurisdiction to determine the said Appeal / Application as the subject matter arises on an issue of ownership of land.

He further alleged that the Application is bad in law, incurably defective and an abuse of the court process and that the orders sought are an affront to the overriding objectives of the court. That the Application is guilty of leaches especially and pursuant to an order of this court made in ELC No. 13 of 2015 and the matter is res judicata light of ELC no. 245 of 2015 and ELC No. 13 of 2015 of which the court already made its pronouncement.

The matter came up for hearing on 24th January 2022 where the court directed the Applicant to file and serve submissions within 3 days and the Respondents to respond within 3 days.

Applicants' Submissions

The Applicant filed their submissions on 26th January 2022 where it was stated that the 1st Respondent did not file a Replying Affidavit to deny the facts set out in the contempt of court application and opted to file grounds of opposition where the 1st Respondent denied the existence, service or knowledge of the orders in question but is raising other unrelated issues.

It was stated that section 5 of the Judicature Act provides for punishment for contempt and the High Court (Organization and Administration) Act 2015 has provisions to punish for contempt at section 36. That section 29 of the Environment and Land Court Act provides that it is an offence punishable upon conviction to a fine not exceeding Kshs. 20,000,000/= or to imprisonment for a term of two years or to both if any person refuses, fails or neglects to obey an order or direction of the court given under the Act. The Applicants relied in the case of **Woburn Estate Limited vs Margaret Bashforth (2016) eKLR**.

It was further stated there is no affront on the overriding objectives of the court as being alleged by the 1st Respondent. That the Application is addressing issues pertaining to orders issued by this court on 1st September 2020 and is not addressing ELC No. 13 of 2015. That ground 6 of the Grounds of opposition does not explain where the issue of res judicata is coming from as no documents have been tabled before the court on the same.

It is the Applicants submissions that the Respondents being aware that orders of status quo were issued, they went ahead two months later in December 2020 to subdivide the suit property. That efforts to obtain the green card pr search certificate of the original parcel have been futile. It is submitted that orders of the court must be obeyed and any party who is dissatisfied with any order can appeal or make orders for review. That the Respondents have opted not to pursue these options but have opted to disobey orders of the court.

The Applicants relied in the case of **Hadkinson vs Hadkinson (1952) 2 ALL ER 567,575** where quoted in **Mawani vs Mawani** it was stated that:

“I am of the opinion that the fact that a party to a cause has disobeyed an order of the court is not itself a bar to being heard, but if his disobedience is such that so long as it continues, it impedes the course of justice in the cause, by making it more difficult for the court to ascertain the truth or to enforce the orders which it may make, then the court may in its discretion refuse to hear him until the impediment is removed or good reason is shown why it should not be removed.”

The Applicants also placed reliance in the case of **Mutitika vs Baharini Ltd (1985) KLR and Econet Wireless Kenya Limited s Minister of Information Communication of Kenya & Another (2005) e KLR** where the High Court held that ***it is a fundamental principle of the Rule of Law that court orders must be obeyed. The importance of this principle has been stated in many decisions in our courts and in particular the court of appeal.***

It was submitted that the Respondents ought to obey court orders issued on 1st September 2020 as it was wrong for them to proceed and subdivide the suit property. The Applicants therefore prayed that the court finds bot the Respondents guilty of the disobedience of the court

orders and should be committed to civil jail for a period not exceeding 6 months.

1st Respondent's Submissions

The 1st Respondent filed his submissions on 31st January 2022 where a number of issues were raised for determination which include among them whether the 1st Respondent is in contempt of the court order as prayed for in the application, whether the Applicants are entitled to further orders, what was the status quo as regards the suit parcel at the time the order dated 1st September 2020 was granted, whether the status quo order is still in force and or have since been dispensed with being that ruling in ELC No. 13 of 2015 had already been delivered in favour of the 1st Defendant, whether this court has jurisdiction to hear and determine this application and whether this matter is res judicata.

It was the 1st Respondent's submission that the applicants' application has no merit as there is a valid judgment and eviction orders in force in the subject suit vide ELC No. 13 of 2015 and the same was duly executed. That the Applicants, servants and or employees were evicted from the suit parcel by Jakacha Auctioneers and an attempt by the Defendant (Morris Olwal) in ELC No. 13 of 2015 to return on the suit was committed to civil jail in contempt of the said eviction orders it was further stated that the status quo orders and the penal notice were never served upon the Respondents and if at all they were served, there should be proof of the same. That prayer 3 in the application is res judicata to both the Application dated 15th July 2018 in ELC No. 13 of 2015 and Succession Cause No. 415 of 2011, Kisumu ELC No. 245 of 2017 application dated 5th July 2017 is a replica to pending application dated 13th March 2020 in ELC No. 46 of 2020 which is seeking for injunctive orders against the 1st Respondent hence an abuse of the court process.

It was the 1st Respondent's prayer that the Application be dismissed with cost to the Respondents.

Issues for Determination

It is the Applicants case that this court issued orders of status quo on 1st September 2020 restraining the Respondents from interfering with the suit property Kisumu/Dago/566 and after the said orders were made, the Respondents proceeded to subdivide the suit parcel into two parcels being Kisumu/Dago/4721 and Kisumu/Dago/4722 and the Applicant is apprehensive that the resultant titles will be transferred to other 3rd parties which will render the suit nugatory. The 1st Respondent did not file a Replying Affidavit and instead he filed Grounds of Opposition where he alleged that the matter had been determined in ELC No. 13 of 2015 and this court lacks jurisdiction to determine this Appeal.

The matter in Kisumu ELC No. 13 of 2015 was between Michael Otieno Wagude vs Morris Olwal Judgment was entered against the Plaintiff and the court ordered that the Defendant to give vacant possession of the land parcel Kisumu/ Dago/566 in 90 days and in default he be forcefully evicted, that the order be extracted and served within 7 days for his attention and compliance and the Defendant to pay the Plaintiff costs. A further order was issued in this matter pursuant to the Application dated 30th July 2019 filed by Michael Otieno Ogude where this court ordered that O.C.S Kisumu Police Station or any other Police Station to provide security to the Applicant to take full possession of the suit parcel of land and to fence the same and remove all illegal structures. That Jakacha Auctioneers were tasked with evicting the Defendant Morris Olwal on the said parcel of land who successfully did the same.

In the present case that is Kisumu ELC No. 46 of 2020, Honourable Lady Justice M.A. Odeny issued orders that the status quo be maintained pending the Ruling in Kisumu ELC No. 13 of 2015. The 1st Respondent herein filed a Notice of Motion Application dated 11th August 2021 seeking orders that the 1st Applicant be cited for contempt of court order where the court found the 1st Applicant to be in contempt and it was ordered that he be jailed for a period of 30 days or in the alternative he pays a fine of Kshs. 50,000/=.

The Black's Law Dictionary 9th Edition, defines contempt as:

The act or state of despising; the conduct of being despised. Conduct that defies the authority or dignity of a court or legislature. Because such conduct interferes with the administration of justice.

Section 5(1) of the Judicature Act which provides that:

“The High Court and the Court of Appeal shall have the same power to punish for contempt of court as is for the time being possessed by the High Court of Justice in England, and that power shall extend to upholding the authority and dignity of subordinate courts.”

Section 29 of the Environment and Land Court is clear to the effect that;

Any person who refuses, fails or neglects to obey an order or direction of the Court given under this Act, commits an offence, and shall, on conviction, be liable to a fine not exceeding twenty million shillings or to imprisonment for a term not exceeding two years, or to both

In the case of **Exparte Langely 1879, 13 Ch D/10 (CA)** Thesiger L.J stated at P. 119 as follows: -

“...the question in each case, and depending upon the particular circumstances of each case, must be, was there or was there not such a notice given to the person who is charged with contempt of Court that you can infer from the facts that he had notice in fact of the order which has been made” And, in a matter of this kind, bearing in mind that the liberty of the subject is to be affected, I think that those who assert that there was such a notice ought to prove it beyond reasonable doubt.”

In the case of **North Tetu Farmers Co. Ltd v. Joseph Nderitu Wanjohi (2016)** eKLR Justice Mativo stated as follows: ' **writing on proving the elements of civil contempt, learned authors of the book Contempt in Modern New Zealand have authoritatively stated as follows: -**

“ there are essentially four elements that must be proved to make the case for civil contempt. The applicant must prove to the required standard (in civil contempt cases which is higher than civil cases - (a) the terms of the order (or injunction or undertaking) were clear and unambiguous and were binding on the defendant; (b) the defendant had knowledge of or proper notice of the terms of the order; (c) the defendant has acted in breach of the terms of the order; and (d) the defendant's conduct was deliberate.”

It is clear that on 1st September 2020, the court issued orders of status quo restraining the Respondents from interfering with the suit property Kisumu/Dago/566 and the Respondents were served with the said orders. However, the 1st Respondent has disputed in his submissions the fact that he was never served with the court orders of 1st September 2020. I am convinced that the 1st Respondent was served with said court orders since in his Application dated 11th August 2021, he had cited the 1st Applicant for contempt as he alleged that the 1st Applicant had used the orders of 1st September 2021 to deny the 1st Respondent access to the parcel of land.

It has been established that the Respondents are in breach of the said court as they proceeded to subdivide the suit property Kisumu/Dago/566 into Kisumu /Dago/4721 and Kisumu/Dago/4722. I do find the Respondents to be in breach of the said orders and hereby order as follows:

1. That a Temporary Injunction do issue restraining the Respondents, their employees, agents, family, servants and/or whomsoever jointly and severally from selling, transferring, disposing, sub dividing, entering into, or in any other way whatsoever interfering with land parcels Kisumu/Dago/4721 and Kisumu/Dago/4722 being the resultant titles from the original suit parcel No. Kisumu /Dago/ 566 pending the hearing and determination of this suit.
2. That the Respondents do committed to civil jail for a period of 30 days or in the alternative each of the Respondent to pay a fine of Kenya Shillings Fifty Thousand (Kshs. 50,0000).
3. That warrants of arrest be issued to the Respondents.
4. The costs of this Application be provided for by the Respondents.

DATED ,SIGNED AND DELIVERED THIS 31ST DAY OF MARCH 2022

ANTONY OMBWAYO

JUDGE

This Ruling has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15th March 2019.

ANTONY OMBWAYO

JUDGE