



No. 262

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT & LAND CASE NO.123 OF 2011

1. LEBOI OLE NAIRENKE

2. MOSES NAIRENKE.....PLAINTIFFS

VERSUS

SAMWEL SHESHOROI.....DEFENDANT

RULING

1. The plaintiffs brought this suit against the defendant on 20th June, 2011 seeking; a declaration that the plaintiffs are the owners of all that parcel of land known as **LR. No. Trans-Mara/Enaenyeny/393** (hereinafter referred to as “**the suit property**”) and that the defendant has no right to interfere with the plaintiffs quiet and peaceful enjoyment of the same, an order for the eviction of the defendant by himself or through his agents and/or servants and/or any person acting on his behalf from the suit property and, an order for general damages and loss of use. The plaintiffs claimed that the 1st plaintiff is the registered owner of the suit property and that the 2nd plaintiff is in possession and occupation of the same with the consent of the 1st plaintiff. The plaintiffs claimed that in the year 2010 or thereabouts, the defendant without any lawful excuse trespassed on the suit property and commenced ploughing thereon and in the process dispossessed the 2nd plaintiff of the same thereby causing the plaintiffs loss and damage. The plaintiffs claimed that the defendant during the same period laid a false claim over the suit property. It is on account of the foregoing that the plaintiffs were forced to institute these proceedings. The defendant filed a defence to the Plaintiffs’ claim on 28th June, 2011 denying the Plaintiffs’ claim in its entirety. In his defence, the defendant admitted that the 1st Plaintiff is the registered proprietor of the suit property which property is separated from the defendant’s own parcel of land known as **LR. No. Transmara/Enaenyeny/304** (hereinafter referred to only as “**Plot No. 304**”) by a stream which forms the boundary between the two properties. The defendant denied ever trespassing into the suit property and claimed that the disputed parcel of land which is the subject of the Plaintiffs’ claim falls a cross the stream on the side of Plot No. 304 and as such is part and parcel of the said plot. The defendant contended that as a result of the Plaintiffs’ claim over the disputed piece of land, the defendant made a complaint to the district land registrar, Transmara district and asked him to visit the suit property and Plot No. 304 for the purposes of identifying and fixing the boundary of the two parcels of land. The defendant contended that the said land registrar visited the site of the two parcels of land on 7th April, 2011 and determined, demarcated and ascertained the boundary position of the same and neither party appealed against

- the exercise. The defendant prayed that the Plaintiffs' suit be dismissed and/or struck out.
2. On 29th November, 2012, the defendant brought an application by way of Notice of Motion dated 28th November, 2012 seeking interlocutory injunction to restrain the Plaintiffs from entering upon, re-entering, trespassing or laying a claim to, building on, cultivating, grazing on, burning bricks on, felling trees, interfering with and/or in any other manner whatsoever dealing with Plot No. 304 which is registered in the name of the defendant pending the hearing and determination of this suit. The defendant's application was brought on the grounds set out on the face thereof and on the affidavit sworn by the defendant on 28th November, 2012. The defendant's case for interlocutory injunction was that, the defendant is the registered proprietor of Plot No. 304 which was registered in his name on 11th January, 2010. The defendant took possession of the said plot soon after the same was registered in his name and has remained in occupation peacefully without any interference from the Plaintiffs or anybody else. Plot No. 304 shares a common boundary with the suit property and that the two plots are separated by a stream which forms the boundary between them. The defendant claimed that on or about 10th November, 2012 while this suit was pending, the Plaintiffs entered into Plot No. 304 without the defendant's permission and commenced cultivation and cattle grazing thereon under the guise that Plot No. 304 was part of the suit property.

The defendant claimed that the said acts by the Plaintiffs were intended to deprive the defendant of his right to possess, use and enjoy the benefits attendant to his ownership of the said Plot No.304. The defendant claimed that the said activities on the part of the Plaintiffs have denied and/or deprived him of the use and occupation and or cultivation of the said plot which he uses solely for cultivation. It is on the basis of the foregoing that the defendant sought the interlocutory injunction. The Plaintiffs' advocates on record were served with the defendant's application but they filed neither a replying affidavit nor grounds of opposition in response to the same. They also did not appear in court for the hearing when the application came up on 20th March, 2013. After satisfying myself that the plaintiffs' advocates on record were duly served with the application, I allowed the defendant to proceed with the application in the absence of the plaintiffs.

3. By a ruling delivered on 3rd July, 2013, I allowed the defendant's application for injunction. From the record, a formal order endorsed with a penal notice was extracted on 10th July, 2013 and was duly signed by the Deputy Registrar and sealed with the seal of the court. The said order restrained the plaintiffs by themselves or through their agents, servants and/or anyone claiming under them from entering upon, re-entering, trespassing onto, laying a claim to, building on, cultivating, grazing on, burning bricks on, felling trees, interfering with and/or in any other manner whatsoever dealing with Plot No. 304 and/or any portion thereof belonging to and registered in the name of the defendant pending the hearing and determination of this suit. The penal notice in the extracted order warned those served with the same that if they disobey the same they risk being cited for contempt of court and may be jailed for up to six months in prison if found guilty.
4. The application before me is the defendant's Notice of Motion dated 24th October, 2013 seeking an order for the arrest and committal of the 2nd plaintiff to jail for a duration not exceeding six (6) months or in the alternative, the attachment of the 2nd plaintiff's properties for disobeying the court order that was made herein on 3rd July, 2013. The said application is supported by the affidavit of the defendant sworn on 24th October, 2013 in which he has stated that the order made herein on 3rd July, 2013 was served upon the plaintiffs personally on 13th July, 2013 through a court process server one, David Okumu Ojill. The defendant has stated further that in breach of the terms of the said order the 2nd plaintiff entered Plot No. 304 on 19th October, 2013 and chased away the driver of a motor tractor who had been engaged by the defendant to cultivate a portion of the said Plot No. 304. The defendant stated further that the 2nd plaintiff threatened the said driver with injury and also threatened to shoot the defendant with arrows. The defendant stated that the incident was reported to the police. The defendant contended that the said acts by the 2nd plaintiff amounts to a breach and/or disobedience of this court's order aforesaid which has not been varied or set aside. The defendant has annexed to his affidavit in support of the application among

- others, a copy of the court order made on 3rd July, 2013, a copy of the affidavit of service by David Okumu Ojill sworn on 15th July, 2013 in which he has deposed that he served the said court order upon the plaintiffs on 13th July, 2013.
5. The defendant's application was opposed by the 2nd plaintiff. In his affidavit in reply sworn on 11th November, 2013, the 2nd plaintiff admitted that he was served with the court order that was made herein on 3rd July, 2013. The 2nd plaintiff denied however that he disobeyed the said order. The 2nd plaintiff claimed that he had been advised by his advocates on record not to enter Plot No. 304 and that even before the institution of this suit he has never entered the said parcel of land. The 2nd plaintiff contended that on 19th October, 2013, the defendant came to his home with a motor tractor and ordered him to vacate the land under his occupation and give way to the defendant who wanted to plough the same for sugar cane cultivation. The 2nd plaintiff contended that the defendant had claimed that the court had ordered the 2nd plaintiff to vacate the disputed parcel of land. The 2nd plaintiff contended that the area the defendant wanted to plough is his residence and farm and that the court order made herein on 3rd July, 2013 did not direct that he be evicted from the said premises. The 2nd plaintiff contended that in the circumstances, he had no alternative but to stop the defendant's said acts of aggression which to him did not amount to a breach or disobedience of the court order of 3rd July, 2013.
 6. On 12th November, 2013, I directed that the defendant's application to be heard by way of written submissions. The defendant's advocates filed their written submissions on 18th November, 2013 while the plaintiff's advocates did not file their submissions as ordered by the court. I have considered the defendant's application together with the affidavit filed in support thereof. I have also considered the 2nd plaintiff's affidavit in reply in opposition to the said application. Finally, I have considered the written submissions filed by the advocates for the defendant and the authorities cited. It is an established principle of law that contempt of court proceedings are quasi criminal in nature because the contemnor is bound to lose his liberty if found guilty of the contempt complained of. In view of this, the standard of proof of contempt is higher than proof on a balance of probabilities. See, the holding in the court of appeal case of, **Mutitika -vs- Baharini Farm Ltd. (1985) KLR 227** that was cited by the defendant where the court stated that the standard of proof in contempt of court proceedings must be higher than proof on a balance of probabilities, and almost but not exactly, beyond reasonable doubt. It follows therefore that for the defendant herein to succeed in the present application, he has to satisfy the court to a degree beyond proof on a balance of probability that the defendant has disobeyed the order of the court made herein on 3rd July, 2013.
 7. As I have mentioned hereinabove, the said court order restrained the plaintiffs by themselves or through their agents, servants and/or anyone claiming under them from entering upon, re-entering, trespassing onto, laying a claim to, building on, cultivating, grazing on, burning bricks on, felling trees, interfering with and/or in any other manner whatsoever dealing with Plot No. 304 and/or any portion thereof belonging to and registered in the name of the defendant pending the hearing and determination of this suit. The said order did not direct the plaintiffs to vacate any portion of Plot No. 304. The defendant sought and was issued with a prohibitive injunction. No order for a mandatory injunction was sought and none was given by the court. For the 2nd plaintiff to be guilty of disobedience of the said court order, the defendant has to prove that the 2nd plaintiff engaged in acts that were prohibited by the terms of the said court order. The defendant has claimed that on 19th October, 2013 the 2nd plaintiff entered Plot No. 304 and chased away the driver of a motor tractor that the defendant had engaged to plough a portion of the said parcel of land and threatened both the defendant and the said driver that he would cause them harm if they dare to continue with the said exercise. In response to this claim, the 2nd plaintiff has admitted that he chased away the defendant's motor tractor driver as claimed by the defendant. The 2nd plaintiff has contended however that what caused him to chase away the defendant and his said driver is that they had gone to plough his homestead and had demanded that he vacates the same which was not in accordance with the terms of the court order of 3rd July, 2013. The defendant did not file a further affidavit in response to the 2nd plaintiff's claims herein. It is therefore not certain whether

the parcel of land which the defendant wanted to plough which activity was stopped by the 2nd plaintiff was the 2nd plaintiff's homestead on the suit property as he claims or was a portion of Plot No. 304. Due to the foregoing, I am not satisfied that the defendant has proved a charge of contempt against the 2nd plaintiff to the required standard.

8. In conclusion, I have found the defendant's application dated 24th October, 2013 to be without merit. The same is accordingly dismissed. The costs of the application shall be in the cause.

Delivered, signed and dated at KISII this 23rd day of May 2014.

S. OKONG'O

JUDGE

In the presence of:-

N/A for plaintiffs

Mr. Ochwang'i for defendant

Mr. Mobisa Court Clerk.

S. OKONG'O

JUDGE