



No. 240

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND CIVIL CASE NO. 186 OF 2010

ONDIEKI MAKORI..... PLAINTIFF

VERSUS

MAYAKA OROGIO..... DEFENDANT

RULING

1. On 23rd January 2013 this court issued an order of a temporary injunction restraining the defendant by himself or through his agents and/or servants from cultivating, tilling or doing any other illegal acts in all that parcel of land known as **LR No. Wanjare/Bokeire/1198** (hereinafter known as “**the suit property**”) pending the hearing of the plaintiff’s application dated 26th November 2012 inter-partes. The order was extracted, signed by the Deputy Registrar of the court, sealed and issued on 25th January 2013.

2. On 13th February 2013 the plaintiff moved the court by an application of the same date seeking an order that the defendant be committed to civil jail for disobeying the court order that was given herein on 23rd January 2013 aforesaid. The plaintiff’s application was supported by the affidavit of plaintiff sworn on 13th February 2013. In the said affidavit, the plaintiff deposed that the court order issued herein on 23rd January 2013 was served upon the defendant in person and through his advocates on record and that despite service as aforesaid; the defendant ignored the said order and continued with cultivation on the suit property. The plaintiff annexed to his affidavit in support of the application an extract of the order that was made on 23rd January 2013 and a copy of an affidavit of service sworn by one Isaiah Miruka on 5th February 2013. In the said affidavit of service, the said Isaiah Miruka stated that he received the court order given herein on 23rd January 2013 from the plaintiff on 30th January 2013 to serve the same upon the defendant and that on the same day he caused the said order to be served upon the defendant who accepted service of the order but refused to acknowledge receipt of the same.

3. The plaintiff’s application was opposed by the defendant through a replying affidavit sworn on 19th April 2013. In the said affidavit, the defendant denied having been served with a copy of the order that was given herein on 23rd January 2013 and termed the contents of the affidavit of service by Isaiah Miruka as false and misleading. The defendant deposed that he has no intention whatsoever of disobeying this court’s orders. When the plaintiff’s application to commit the defendant to civil jail for contempt came up for hearing on 24th July 2013, the defendant’s advocate sought leave of the court to cross-examine the process server the said, Isaiah Miruka on his affidavit sworn on 5th February 2013 which application was allowed and the matter stood over to 4th November 2013. On 4th November 2013, the defendant’s advocate cross-examined the said process server on his affidavit of service. In his

testimony, the said process server stated that he swore the affidavit of service dated 5th February 2013 which was annexed to the plaintiff's affidavit sworn on 13th February 2013 in support of the plaintiff's application for contempt. He stated that he served the court order of 23rd January 2013 upon the defendant at his home in Wanjare. He stated that he had served the defendant earlier with the summons to enter appearance in this suit and as such the defendant's home was known to him. In his submission in support of the application, the plaintiff relied entirely on his affidavit sworn on 13th February 2013 and urged the court to grant the orders sought. He submitted that the defendant was duly served with the court order that was issued on 23rd January 2013. The plaintiff submitted that the defendant has continued to enter the suit property to harvest sugarcane therefrom even after the court had issued an order stopping such activity. The plaintiff submitted further that in defiance of the said court order the defendant proceeded to plant maize on the suit property in the month of August, 2013.

4. In his submission after cross-examining the process server, the defendant's advocate submitted that the defendant was not served with the court order given by this court on 23rd January 2013. The defendant's advocate argued that the place at which the process server had stated in the affidavit of service to have served the defendant was not the defendant's home. Counsel argued that according to the affidavit of service, the process server had served the defendant at Suneka while in his evidence during cross examination he stated that he served the defendant at his home in Wanjare, Bomakora location of Suneka Division. Counsel argued that the defendant has complied with the court order since the same was brought to his attention. He argued that there is very little the defendant can do about the sugarcane that he planted on the suit property earlier before the court order.

5. I have considered the plaintiff's application together with the affidavit filed in support thereof. I have also considered the defendant's affidavit in reply in opposition to the application and the oral submissions by the plaintiff and the defendant's advocate. What I need to determine in the application before me is whether the defendant has disobeyed the court order that was given herein on 23rd January 2013 and if so whether he should be punished for contempt of court. In order to determine this issues, I would need to consider the terms of the order that was issued on 23rd January 2013, whether the order was extracted, whether it had a penal notice, whether it was served personally upon the defendant and whether the defendant with the knowledge of the contents of the said order proceeded to disobey the same. It is now well settled that the standard of proof of contempt is above a balance of probabilities but not beyond reasonable doubt. It is not in dispute that the court issued an order herein on 23rd January 2013 restraining the defendant from doing certain acts on the suit property which included cultivating or tilling the suit property. It is not in dispute that the said order was extracted with a penal notice. What is disputed is whether the said order was served upon the defendant. The defendant denied service of the order upon him, while the plaintiff maintained that the defendant was duly served. The process server Isaiah Miruka in his affidavit of service filed in support of the application herein stated that the defendant was served at a place called Suneka. However during cross-examination by the defendant's advocate, the said process server claimed that he served the defendant with the court order at Wanjare in Bomakora sub-location. It follows that the contents of the process server's affidavit is different from what he stated in court. This conflict creates doubt on the truthfulness of his affidavit of service the benefit of which doubt must be given to the defendant. Due to the foregoing, it is my finding that the plaintiff has not proved to the required standard that the defendant is guilty of contempt of court. The plaintiff has proved the existence of the order, the extraction of the same and the endorsement thereof with a penal notice. The plaintiff has failed however to prove that the said order was served upon the defendant. This is because the process server who is said to have served the said court order has given conflicting statements in his affidavit and the statement he gave in court as to where he served the defendant.

6. The upshot of the foregoing is that the plaintiff's application dated 13th February 2013 is not for granting. The same is dismissed. The costs shall be in the course. The plaintiff should take steps to list his application dated 26th November 2012 for hearing inter-partes. For the avoidance of doubt the orders issued herein on 23rd January 2013 shall remain in force and the defendant who is now aware of the terms thereof must comply with the same failure to which the plaintiff would be at liberty to bring a fresh application for the enforcement thereof.

Delivered, dated and signed at Kisii this 16th day of May 2014.

S. OKONG'O

JUDGE

In the presence of:-

The Plaintiff present in person

N/A for the Defendant

Mr. Mobisa Court Clerk

S. OKONG'O

JUDGE