



No. 275

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISII**

**ENVIRONMENT AND LAND CIVIL CASE NO. 204 OF 2012**

DAVID OWINO OKONG'O ..... PLAINTIFF

VERSUS

MARY KEKE .....1<sup>ST</sup> DEFENDANT

CHECHE KEKE.....2<sup>ND</sup> DEFENDANT

DANIEL MAGERO.....3<sup>RD</sup> DEFENDANT

EZEKIEL ODUK..... 4<sup>TH</sup> DEFENDANT

**RULING**

1. What I have before me is the plaintiff's application that was brought on 19<sup>th</sup> November 2013 by way of Notice of Motion dated 18<sup>th</sup> November 2013 under Order 3(a) rule 3 (sic) of the Civil Procedure Rules and sections 1A, 1B and 3A of the Civil Procedure Act seeking the following prayers:
  - a. **That the matter be certified as urgent and the applicant be given leave to cite the 1<sup>st</sup> and 2<sup>nd</sup> respondents for contempt.**
  - b. **That the court be pleased to commit the 1<sup>st</sup> and 2<sup>nd</sup> defendants for disobedience of this court's orders.**
  - c. **That the sugarcane planted on land parcel No. LR Kamagambo/Kanyimach/155 purportedly illegally subdivided into 901 and 902 respectively be removed.**
  - d. **That the cost of the application be provided for.**

The plaintiff's application was brought on the grounds set out in the body thereof and on the supporting affidavit sworn by the plaintiff, David Owino Okong'o on 18<sup>th</sup> November 2013. In summary, the plaintiff's application was brought on the grounds that; on 26<sup>th</sup> February 2013 this court issued an order restraining the 1<sup>st</sup> and 2<sup>nd</sup> defendants from carrying out any activity on the parcel of land known as **LR. No. Kamagambo/Kanyimach/155** (hereinafter referred to as "**Plot No. 155**"). In breach of the said court order, the 1<sup>st</sup> and 2<sup>nd</sup> defendants planted sugarcane on Plot No. 155 and were in the process of weeding the same. The plaintiff contended that the 1<sup>st</sup> and 2<sup>nd</sup> defendants having disobeyed the said order of the court, they should be committed to civil jail for

contempt and the sugarcane that they planted on Plot No. 155 in defiance of the said court order should be uprooted and removed from the said parcel of land.

2. The plaintiff annexed to his affidavit in support of the application two letters both dated 4<sup>th</sup> July 2013 addressed to among others the 1<sup>st</sup> and 2<sup>nd</sup> defendants by the Senior Assistant Chief of Kamreri Sub-location directing the 1<sup>st</sup> and 2<sup>nd</sup> defendants to keep off Plot No. 901. The plaintiff has also annexed a copy of the order of the court that was made on 22<sup>nd</sup> February, 2013 and issued on 26<sup>th</sup> February, 2013 which the plaintiff claimed to have been breached and a copy of an application dated 18<sup>th</sup> February 2013 which the plaintiff claimed to have been the basis of the said order.
3. The plaintiff's application was opposed by the 1<sup>st</sup> and 2<sup>nd</sup> defendants who filed a replying affidavit sworn by the 1<sup>st</sup> defendant on 12<sup>th</sup> February 2014. In their response to the plaintiff's application, the 1<sup>st</sup> and 2<sup>nd</sup> defendants contended that there are only two court orders of injunction that have been made herein, namely the court order that was made on 22<sup>nd</sup> February 2013 at the instance of the 3<sup>rd</sup> defendant and which order restrained the plaintiff from interfering with the 3<sup>rd</sup> defendant's parcel of land known as **LR. No. Kamagambo/ Kanyimach/901** (hereinafter referred to as "**Plot No. 901**") and the court order that was made on 28<sup>th</sup> June 2013 at the instance of the 1<sup>st</sup> defendant and which order restrained the plaintiff from interfering with the 1<sup>st</sup> defendant's parcel of land known as **LR No. Kamagambo/Kanyimach/163** (hereinafter referred to as "**Plot No. 163**").
4. The 1<sup>st</sup> and 2<sup>nd</sup> defendants contended that Plot No. 901 is registered in the name of the 3<sup>rd</sup> defendant while Plot No. 163 is registered in the name of the 1<sup>st</sup> defendant and that, there is no court order restraining the 1<sup>st</sup> and 2<sup>nd</sup> defendants from dealing with any of the said parcels of land in any manner whatsoever. The 1<sup>st</sup> and 2<sup>nd</sup> defendants denied ever interfering with Plot No. 155 (now subdivided into Plot No. 901 and 902) and contended that in any event, Plot No. 155 is non-existent the same having been subdivided to give rise to the said Plot No. 901 and Plot No. 902. The 1<sup>st</sup> and 2<sup>nd</sup> defendants contended that their activities have been confined to Plot No. 163 which to them has no relationship whatsoever with either Plot No. 901 or Plot No. 902. The 1<sup>st</sup> and 2<sup>nd</sup> defendants contended further that infact it is the plaintiff who has been disobeying the orders issued herein on 22<sup>nd</sup> February 2013 and 28<sup>th</sup> June 2013 aforesaid by continuing to carry out construction on Plot No. 163. The 1<sup>st</sup> and 2<sup>nd</sup> defendants termed the plaintiff's application as grossly incompetent and a mockery of the due process of the law. The 1<sup>st</sup> and 2<sup>nd</sup> defendants contended that no order has been made against them and none has been served upon them by the plaintiff to warrant the granting of the orders sought herein. The 1<sup>st</sup> and 2<sup>nd</sup> defendants urged the court to dismiss the plaintiff's application as an abuse of the court process.
5. When the plaintiff's application came up for hearing before me on 5<sup>th</sup> May 2014, Mr. Okungu appeared for the plaintiff while Mr. Odhiambo appeared for the 1<sup>st</sup> and 2<sup>nd</sup> defendants. In his submissions in support of the plaintiff's application, Mr. Okungu reiterated the contents of the plaintiff's affidavit in support of the application and submitted that the 1<sup>st</sup> and 2<sup>nd</sup> defendants have planted sugarcane on Plot No. 155 and are in the process of weeding the same in breach of the orders issued by this court on 26<sup>th</sup> February 2013. Mr. Okungu submitted that the said order of 26<sup>th</sup> February 2013 directed the parties herein which include the 1<sup>st</sup> and 2<sup>nd</sup> respondents to maintain the status quo. Mr. Okungu submitted that the two letters from the area assistant chief that I have referred to hereinabove are clear proof of the fact that the 1<sup>st</sup> and 2<sup>nd</sup> defendants have entered the disputed parcel of land namely, Plot No. 155 and are carrying out farming activities thereon. Mr. Okungu submitted that the plaintiff has demonstrated that the 1<sup>st</sup> and 2<sup>nd</sup> defendants are in breach of the said court order and as such they should be committed to civil jail for contempt of court.
6. In reply to Mr. Okungu's submissions, Mr. Odhiambo also reiterated the contents of the 1<sup>st</sup> defendant's replying affidavit sworn in opposition to the application. Mr. Odhiambo submitted that the plaintiff's application is misconceived and is an abuse of the court process. Mr.

Odhiambo submitted that there are only two court orders of injunction which have been issued herein, the details of which I have set out hereinabove and that none of the said orders restrained the 1<sup>st</sup> and 2<sup>nd</sup> defendants from dealing with Plot No. 163, Plot No. 901 or Plot No. 155. Mr. Odhiambo submitted that the two court orders were all directed against the plaintiff with the first order made on 22<sup>nd</sup> February 2013 restraining the plaintiff from interfering with Plot No. 901 and the second order that was made on 28<sup>th</sup> June 2013 restraining the plaintiff from trespassing on and/or interfering with Plot No. 163. Mr. Odhiambo submitted that there is no order restraining the 1<sup>st</sup> and 2<sup>nd</sup> defendants from cultivating Plot No. 163 or any other plot. Counsel reiterated that it is the plaintiff who is in breach of the court order that was issued on 28<sup>th</sup> June 2013 in that the plaintiff has continued with the construction of a permanent structure on the said parcel of land in contempt of the said court order. Counsel submitted further that the plaintiff's application is not properly before the court in that the plaintiff has not invoked the provisions of Order 40 rule 3 of the Civil Procedure Rules under which an application for committal for contempt arising from a breach of an injunction order should be brought. Counsel submitted therefore that the court's jurisdiction having been improperly invoked, the court has no power to grant the orders sought by the plaintiff. In response to Mr. Odhiambo's submissions, Mr. Okungu submitted that the order that was made herein on 22<sup>nd</sup> February 2013 and issued on 26<sup>th</sup> February 2013 was directed at both parties and that the same required the parties to maintain status quo. Mr. Okungu submitted therefore that the 1<sup>st</sup> and 2<sup>nd</sup> defendants were bound by the said court order.

7. I have considered the plaintiff's application together with the affidavit filed in support thereof. I have also considered the 1<sup>st</sup> and 2<sup>nd</sup> defendants affidavit in reply to the said application and the submissions made by the advocates for both parties. As I have stated at the beginning of this ruling, the plaintiff has sought three substantive reliefs namely, leave to institute contempt of court proceedings against the 1<sup>st</sup> and 2<sup>nd</sup> defendants, an order for the committal of the 1<sup>st</sup> and 2<sup>nd</sup> defendants to civil jail for disobedience of a court order and an order for the removal of the sugarcane that has been planted on Plot No. 155 by the 1<sup>st</sup> and 2<sup>nd</sup> defendants.
8. To start with the first relief sought, the law is now settled that leave is not required before contempt of court proceedings are instituted against a party who has breached an order of injunction. Under Order 40 Rule 3 (1) of the Civil Procedure Rules 2010, the court that has granted an order of injunction has the power to order a person in breach of such order to be detained in prison for a term not exceeding six (6) months. There is no requirement under that rule for leave to be sought before an application is made for such order. The first prayer in the plaintiff's application is therefore misconceived and superfluous. The disposal of that issue takes me to the second relief sought namely, the committal of the 1<sup>st</sup> and 2<sup>nd</sup> defendants to jail for disobedience of the order allegedly issued herein. For this court to be able to commit the 1<sup>st</sup> and 2<sup>nd</sup> defendants to civil jail for disobedience of a court order, the applicant must establish that; there was a court order restraining the 1<sup>st</sup> and 2<sup>nd</sup> defendants from doing a particular thing or directing the 1<sup>st</sup> and 2<sup>nd</sup> defendants to take particular action, that the said court order was extracted and served upon the 1<sup>st</sup> and 2<sup>nd</sup> defendants and that the 1<sup>st</sup> and 2<sup>nd</sup> defendants in defiance of the said order engaged in the act that was prohibited thereunder or failed to do what the order had directed them to do. The onus was upon the plaintiff to show the existence of the alleged court order, the extraction and service of the same upon the 1<sup>st</sup> and 2<sup>nd</sup> defendants and the defiance thereof by the 1<sup>st</sup> and 2<sup>nd</sup> defendants.
9. I am not persuaded that the plaintiff has discharged the burden that is placed upon him by law. I am in agreement with the submission by the advocate for the 1<sup>st</sup> and 2<sup>nd</sup> defendants that there have been only two court orders of injunction issued herein. The first order was made on 22<sup>nd</sup> February 2013 and was issued on 26<sup>th</sup> February 2013. This order was made pursuant to an application by the 3<sup>rd</sup> defendant dated 22<sup>nd</sup> October 2012. The application was brought against the plaintiff on the grounds that the plaintiff had forcefully entered Plot No. 901 and commenced cultivation thereon. Following that application, the court ordered the status quo in relation to Plot No. 901 to be maintained and restrained the plaintiff from encroaching and/or trespassing on the said parcel of land pending the hearing and determination of this suit. The second order was made on 28<sup>th</sup>

June 2013. This order was made pursuant to an application by the 1<sup>st</sup> defendant dated 18<sup>th</sup> February 2013. This application was brought against the plaintiff on the ground that the plaintiff had entered Plot No. 163, destroyed maize crops planted thereon and commenced construction of a building thereon.

10. By this order, the court restrained the plaintiff from trespassing on Plot No. 163 pending the hearing and determination of this suit. It is clear from the foregoing that the two orders of injunction that have been issued herein have all been directed against the plaintiff. None of the said orders was directed against the 1<sup>st</sup> and 2<sup>nd</sup> defendants. The order made on 22<sup>nd</sup> February 2013 which the plaintiff has cited as the basis for the present application directed the maintenance of status quo and restrained the plaintiff from encroaching onto and/or trespassing on Plot No. 901. As I have already mentioned, that order was made at the instance of the 3<sup>rd</sup> defendant and the application in which it was made was brought by the 3<sup>rd</sup> defendant against the plaintiff. The limb of that order that directed the maintenance of status quo which the plaintiff's advocate has heavily grounded his argument in support of the present application cannot in any event be extended to the 1<sup>st</sup> and 2<sup>nd</sup> defendants herein. The 1<sup>st</sup> and 2<sup>nd</sup> defendants were not parties to the said application and they have nothing to do with Plot No. 901 that was the subject of that order their parcel of land being Plot No. 163. I may wish to add that the status quo that was supposed to be maintained by the parties pursuant to the said order was to restrain the plaintiff who had forcefully entered Plot No. 901 from further encroaching and/or trespassing on the said parcel of land.

11. Due to the foregoing, I am in agreement with the submission by the advocate for the 1<sup>st</sup> and 2<sup>nd</sup> defendants that there is no order that was issued herein restraining the 1<sup>st</sup> and 2<sup>nd</sup> defendants from entering and/or dealing with and/or cultivating the parcels of land known as Plot No. 163, Plot No. 155, Plot No. 901 or Plot No. 902. In the absence of such order, I am of the opinion that the plaintiff's application for the committal of the 1<sup>st</sup> and 2<sup>nd</sup> defendants to civil jail for contempt of court is misconceived and has no basis. This being the finding of the court, the plaintiff's third prayer in the application which is seeking the removal of the sugarcane purportedly planted on Plot No. 155 cannot be granted. The plaintiff has failed to demonstrate that there was an order of this court barring the 1<sup>st</sup> and 2<sup>nd</sup> defendants from planting sugarcane on Plot No. 155 and that the 1<sup>st</sup> and 2<sup>nd</sup> defendants proceeded to plant sugarcane on the alleged Plot No. 155 which is non-existent in breach of the said order.

12. The upshot of the foregoing is that the plaintiff's application dated 18<sup>th</sup> November 2013 is without merit and the same is hereby dismissed with costs to the 1<sup>st</sup> and 2<sup>nd</sup> defendants. In conclusion, I must say that I have had enough of interlocutory applications in this suit. The parties should take immediate steps to prepare this suit for trial instead of engaging in side shows.

**Delivered, dated and signed at Kisii this 20<sup>th</sup> day of June 2014.**

**S. OKONG'O**

**JUDGE**

**In the presence of:-**

N/A for the plaintiff

Mr. Ochwang'i h/b for Odhiambo for the 1<sup>st</sup> and 2<sup>nd</sup> defendants

Mr. Ochwang'i for the 3<sup>rd</sup> and 4<sup>th</sup> defendants

Mr. Mobisa Court Clerk

**S. OKONG'O**

**JUDGE**