



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND CASE NO. 321 OF 2013

NELSON OMOLO ACHOLA PLAINTIFF

VERSUS

GEORGE OMONDI AJWALA DEFENDANT

RULING

1. On 29th August 2013, this court made an order of injunction restraining the defendant by himself or through his agents, servants and/or anyone claiming under the defendant from entering into, trespassing onto, making bricks, cultivating, building structures, interfering with and/or in any other manner whatsoever dealing with all that parcel of land known as **LR No. Kanyamkago/Kawere II/3162** (hereinafter referred to as “**the suit property**”) or any portion thereof pending the hearing and determination of this suit. That order was made on an application for a temporary injunction that was made by the plaintiff on 12th August 2013 in which the plaintiff had contended that the defendant had entered into the suit property which is owned by the plaintiff without the plaintiff’s permission and commenced construction of structures, making of bricks and cultivation.

2. The plaintiff had contended that the actions by the defendant aforesaid amounted to trespass on the suit property and an infringement on the plaintiff’s rights over the suit property. The plaintiff exhibited in his affidavit in support of the application aforesaid a copy of his title deed for the suit property, a photograph showing the activities the defendant was said to be carrying out on the suit property and a copy of a demand letter that is said to have been written to the defendant by the plaintiff’s advocates to cease the said activities. The plaintiff’s application was not opposed by the defendant and after satisfying myself that the plaintiff had established a prim facie case against the defendant I proceeded to grant the injunction that had been sought by the plaintiff.

3. The said injunction order has not been set aside or varied. What I now have before me is the plaintiff’s application dated 28th October 2013 in which the plaintiff has sought an order that the defendant be cited and punished for disobeying this court’s order of injunction that was made on 29th August 2013 aforesaid. The plaintiff has sought the arrest and committal of the defendant to civil jail for disobedience of the court order aforesaid and in the alternative, attachment of the defendant’s properties and sale of the same to defray the damages that have been occasioned by the defendant’s disobedience of the order aforesaid. The plaintiff’s application has been brought on the grounds that the order of 29th August 2013 was extracted, endorsed with a penal notice and personally served upon the defendant. The plaintiff has contended that despite having been personally served with the said court order the defendant has continued to cultivate, make bricks and put up structures on the suit property in defiance of the said court order which was served upon the defendant on 11th September 2013.

4. The plaintiff exhibited in his affidavit sworn on 28th October 2013, a copy of the formal order that was

extracted from the ruling of the court that was delivered on 29th August 2013, a copy of affidavit of service of one David Okumu Ojill in proof of service of the said order upon the defendant and copies of photographs showing the activities which the defendant is said to be still carrying out on the suit property. The plaintiff has contended that the defendant's conduct is intended to disparage the dignity and/or integrity of the court. The plaintiff has urged the court to punish the defendant so as to maintain the rule of law and to safeguard the court's own dignity.

5. The plaintiff's application was opposed by the defendant. The defendant denied that he has trespassed on the suit property. The defendant contended that he is in occupation of all that parcel of land known as **LR No. Kanyamkago/Kawere II/4898** (hereinafter referred to as "**Plot No. 4898**") which is registered in his name and on which he is carrying out the activities complained of by the plaintiff. The defendant has contended that the suit property and Plot No. 4898 are separate and distinct and that they do not share a boundary. The defendant contended that he purchased Plot No. 4898 which was a portion of LR No. Kanyamkago/Kawere II/4277 ("Plot No. 4277") from one John Otieno Obunga who is not the same person from whom the plaintiff purchased the suit property. The defendant contended that he is a stranger to the plaintiff and that he has not disobeyed the injunction order that he claimed to have been served upon him by the area chief. The defendant urged the court to order that the district land surveyor and district land registrar do proceed to the two (2) parcels of land for the purposes of fixing their boundaries. The defendant urged the court to dismiss the plaintiff's application for contempt. The defendant annexed to his affidavits sworn on 14th January 2013, 12th March 2013 and 20th May, 2014; copies of certificate of official search in respect of Plot No. 4277, agreement for sale of a portion of Plot No. 4277, a title deed for Plot No. 4898 and a certificate of official search for Plot No. 4898.

6. On 20th February 2014, I made an order that the plaintiff's application be canvassed by way of written submissions. The plaintiff filed his written submission on 23rd April 2014. The defendant did not file his written submissions within the time that had been prescribed by the court. When the matter came up on 28th May 2014 for a ruling date, the court allowed the defendant to make oral submissions which he did. The defendant made further oral submission on 25th June 2014 when the plaintiff and his advocate Mr. Oguttu Mboya also addressed the court in response to the defendant's submissions. The plaintiff addressed the court at the request of the court that wanted the plaintiff to respond in person to certain issues that were raised by the defendant.

7. I have considered the plaintiff's application together with the affidavit filed in support thereof. I have also considered the defendant's three (3) affidavits filed in opposition to the application. Finally, I have considered the submissions both written and oral made by the plaintiff's advocates and the oral submissions by the defendant. In the case of **Mutitika –vs- Baharini Farm Ltd [1985] KLR 227** it was held among others that;

“(i) A person who knowing of an injunction or an order of stay willfully does something, or causes others to do something to break the injunction or interfere with the stay, is liable to be committed for contempt of court as such a person has by his conduct obstructed justice

(ii) The standard of proof in contempt proceedings must be higher than proof on a balance of probabilities and almost but not exactly beyond reasonable doubt as it is not safe to extend the latter standard to an offence which is quasi criminal in nature. The guilt of the contemnor has to be proved with such strictness of proof as is consistent with the gravity of the charge.”

8. On the material before me, there is no dispute that the court did issue an order of injunction against the defendant restraining the defendant from engaging in certain activities. It is also not in dispute that the said order was extracted and a penal notice endorsed thereon. The plaintiff produced in court an affidavit of service of the said order upon the defendant. The defendant admitted in paragraph 6 of his replying affidavit sworn on 14th January, 2014 that he was served with the court order but not by the plaintiff's process server David Okumu Ojil but by the area chief. In his submission, the defendant contended that he was not served with the said court order. I am of the view that the defendant having admitted on oath that he was served with the subject court order, his submission that the order was not served upon him has

no basis and cannot be taken seriously. I would hold therefore that the order of 29th August 2013 was served upon the defendant.

9. The next and most fundamental issue is whether the said order was disobeyed by the defendant. In his replying affidavits and oral submissions, the defendant denied that he breached the court order of 29th August 2013. The defendant contended that he is carrying out the activities complained of in his own parcel of land and not on the suit property as claimed by the plaintiff. The court had in its ruling dated 29th August 2013, held that the plaintiff had established on a prima facie basis that the land on which the defendant was making bricks and carrying out cultivation belonged to the plaintiff. It is for this reason that the defendant was ordered to stop the said activities. It is not therefore open to the defendant while the said court order remains subsisting to contend that the activities complained of by the plaintiff are being carried out on Plot No. 4898 and not on the suit property. The issues raised by the defendant should have formed part of his defence to the injunction application which he never defended.

10. If the defendant is convinced that his activities which are the subject of this suit and which were restrained temporarily by this court are restricted to his own parcel of land, he is at liberty to apply for the variation or the setting aside of the injunction that was granted against him ex parte on 29th August 2013. Until then, he has no alternative but to obey the order of the court that restrained the said activities. As was held in the case of **Hadkinson –vs- Hadkinson [1952] 2ALL ER 567**, a party who knows of an order whether null or valid regular or irregular cannot be permitted to disobey it. The only recourse open to such a party is to apply to court for the variation or discharge of the order and as long as the order existed it must be obeyed.

11. I am satisfied that the plaintiff has proved to the required standard that the defendant disobeyed the court order issued herein on 29th August 2013. The plaintiff has proved that the order was extracted and served upon the defendant personally. The order had a penal notice that warned the defendant of the consequences of disobeying the said order. The plaintiff has proved that even after being served, the defendant continued with the activities that had been restrained by the court. It is my finding therefore that the defendant is guilty of contempt of court. The court shall hear the defendant in mitigation if he so wishes to address the court in that regard before he is sentenced. The defendant shall be summoned by the deputy registrar to appear in court for sentencing within 21 days from the date hereof if he is not present in court today.

Delivered, signed and dated at KISII this 31ST of October, 2014.

S. OKONG'O

JUDGE

In the presence of:-

Mr. Oguttu-Mboya for the plaintiff

N/A for the defendant

Mr. Mobisa Court Clerk

S. OKONG'O

JUDGE