

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITALE

CIVIL SUIT NO. 31 OF 2014

EMKOS COMPANY LTD.....PLAINTIFF

VERSUS

CHARLES ASIKOWA OKOLO.....DEFENDANT

R U L I N G

1. The applicant Charles Asikowa Okolo brought a notice of motion dated 7/10/2014 in which he seeks the court's leave to harvest farm produce on LR NO. 8994/20 IR 57774 as well as costs of the application. The application is brought under the provisions of sections 3, 3A and 63 (e) of the Civil Procedure Act. The applicant contends that he is a purchaser of the suit land and was given vacant possession. That on 18/4/2014 this court gave restraining orders against himself, workers and or agents. That prior to the court granting the orders, he had planted food crops which are now due for harvesting and that if he is not granted leave to harvest the same, he will suffer irreparable damage as he had spent a lot in preparing for the crops.

2. The application is opposed by the respondent Emkos Company Limited through a replying affidavit sworn on 14/10/2014. The respondent contends that the applicant has acted defiantly in contempt of an order of the court which restrained him from in any way interfering with the suit land. The respondent contends that the applicant has already cut the maize which is in stacks awaiting harvesting and that as he did not seek the court's leave to weed the crops, he cannot come back to court seeking the court's leave to harvest the same.

3. This is an interesting application coming from a person who has acted, defiantly in contempt of orders of the court. I will briefly give a background to this application. The applicant herein had filed a suit being Kitale HCCC NO 39 of 2011 against three defendants. The third defendant in that case was the respondent in this case. The first defendant was one Benjamin Nyamumbo Oonge and the second defendant was Agricultural finance Corporation. In that suit, the present applicant was seeking among other orders, specific performance of the agreement for sale or in the alternative, refund of the purchase price.

4. At the conclusion of that case, the court found that the first defendant, Benjamin Nyamumbo Oonge who had sold the land to the applicant had no power to do so as the land belonged to the respondent herein. The suit against the second and third defendant was dismissed with costs. The applicant got a judgement for refund of the purchase price against Benjamin Nyamumbo Oonge. Kshs.2.9 million was paid towards the settlement of the amount ordered.

5. The third defendant in that case Emkos Company Limited moved to court and filed the present suit against the applicant. The respondent sought restraining orders directed at the present applicant ordering him to refrain from interfering with the suit property. In a ruling delivered on 31/3/2014, the court granted the respondent's prayers. The applicant and his advocate's representative were in court when the ruling was delivered. Thereafter an order was extracted and served upon the applicant. Despite the applicant having been present when the ruling was delivered and the extracted order having been served upon him, he went a head to plant maize on the suit land. He weeded the maize and has since cut the same which is in stacks ready for harvesting. He now comes to court seeking leave of court to harvest the same.

6. Prior to the orders of 31/3/2014 being granted, the applicant had been restrained by order of court given on 29/1/2014 restraining him from interfering with the suit land. The applicant was served with the orders of 29/1/2014. He cannot therefore argue that he planted the maize before the court gave the orders restraining him. The court's orders of 29/1/2014 remained valid. They were never set aside. Again when the respondent obtained the orders in this suit on 31/3/2014, the applicant did not obey them. He went on to plant on the suit land, proceeded to weed, has cut the maize which is now in stacks and he is only coming to court for leave to harvest the maize from where they are in the stacks.

7. The applicant still maintains that the suit land belongs to him and that he can do as he wishes. This is despite the fact that he has a judgement in his favour where he has been paid partially. I think the applicant's application is an abuse of the process of the court. As at the time he planted the maize, there was an order restraining him from doing so. There is a contention from the respondent that the applicant went a head to plant where the deponent of the affidavit had ploughed. This was in defiance of a court order. This defiance is still going on. The applicant has moved to put up a house on the suit land. The applicant's servant has already been charged in the lower court with disobedience of court order. This is not conduct of a person who can be given equitable orders. I find that the applicant's application has no merit. The same is hereby dismissed with costs to the respondent.

It is so ordered.

Dated, signed and delivered at Kitale on this 22nd day of October, 2014

E. OBAGA

JUDGE

In the presence of Mr Kiarie for respondent and Professor Sifuna for Mr Ochanda for applicant. Court Clerk – Kassachoon.

E. OBAGA

JUDGE

22/10/2014