



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITALE

MISC. CIVIL CASE NO. 49 OF 2013

PAUL WANYONYI MAKOKHA.....PLAINTIFF

VERSUS

CATHERINE NALIKA.....DEFENDANT

RULING

1. The applicant Paul Wanyonyi Makokha brought a notice of motion dated 12/7/2013 in which he seeks leave of court to cite and punish the respondent Catherine Naliaka for contempt of court. The applicant contends that the respondent was served with an order of court given on 6/5/2013. That the respondent and her sons moved out of the suit land upon being served with the order.

2. The applicant contends that the respondent's lawyer wrote a letter to the area chief advising the chief that the order was an injunction and that it did not amount to an eviction order. The respondent was then allowed to go back to the suit property based on the letter from her lawyer which was addressed to the area chief. The applicant contends that the respondent has disobeyed a court order and that she should be punished for that.

3. The respondent filed a replying affidavit in which she contends that she has not disobeyed any order. She contends that she was not served with any court order and that she is not residing on the suit land.

4. I have carefully gone through the applicant's application as well as the replying affidavit of the respondent and the submissions by counsel for both parties. The practice in contempt of court proceedings is that the applicant has to make an application for leave to be allowed to cite the alleged contemnor for contempt. Once the leave is granted, then the applicant brings an application detailing the alleged acts of contempt. In the present application, it appears that the applicant is seeking leave to cite the respondent for contempt at the same time calling for punishment of the respondent for contempt of court order. This is clear from the applicant's submissions. However be that as it may, I will go ahead to determine whether this application should be allowed.

5. Before a person is cited and punished for contempt, the applicant must prove the following;-

1. That there was a valid court order issued asking the alleged contemnor to do or not to do the act complained of.

2. That the said order was personally served upon the alleged contemnor or that the contemnor was aware of the said court order.

3. That the said court order contained a penal notice warning the alleged contemnor of the consequences of disobeying the same.

4. That the alleged contemnor disobeyed the same.

6. In the instant case, there is no contention that there was a valid court order. The court order was a mandatory injunction issued directed at the removal of the respondent and her servants or agents from the suit land.

7. There is no evidence that the said order was served upon the respondent. There is no affidavit of service which has been annexed to the applicant's application. Though the applicant contends that the respondent was in court when the order was given, there is nothing upon which the court can ascertain whether this was the position. This application has not been filed in the file which resulted to the order. It is therefore difficult to tell whether the respondent or her lawyer was in court.

8. There is of course a penal notice contained in the order. The last question to be addressed is whether there was disobedience of the said order. The order was directing the removal of the respondent

9. from the suit land. There is nothing to show if the respondent was removed from the suit land as directed in the order. The applicant is only contending that the respondent went back to the suit land on the strength of her lawyer who advised that there was no eviction order issued. A look at the letter by the respondent's lawyer shows that she wrote to the chief asking him to desist from allowing his people to be misused in asking the respondent to move out of the suit land. There is no mention in that letter that the respondent had been removed from the suit land.

10. The respondent herself stated that she is not on the suit land. The applicant did not offer any evidence that she is indeed on the suit land. The evidence would have included structures on the land or some cultivation. The court cannot cite the respondent for contempt where there is no demonstration that she is in contempt of the court order. For the reasons given herein above, I find that the application herein lacks merit. The same is dismissed with costs to the respondent.

It is so ordered.

Dated, signed and delivered at Kitale on this 21st day of October, 2014.

E. OBAGA

JUDGE

In the presence of M/S Munialo for applicant. Court Clerk Kassachoon.

E. OBAGA

JUDGE

21/10/2014