



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAKAMEGA

ELCC NO. 409 OF 2017

**RICHARD WALALA OGOLLAH .....PLAINTIFF**

**VERSUS**

**LUKA NDALUSIA YESWA.....DEFENDANT**

**RULING**

1. Judgment was delivered in this matter on 23<sup>rd</sup> June 2020 as follows:

**1. An order of permanent injunction be issued restraining the defendant either personally or through his agents, relatives, servants, assigns and/or any other person acting his authority from trespassing, entering, utilizing and/or in any other manner from interfering with the plaintiff's peaceful use of his parcel of land No. Butso/Indangalasia/5663.**

**2. Costs of this suit to the plaintiff.**

2. Subsequently, the plaintiff filed Notice of Motion dated 1<sup>st</sup> October 2021 seeking the following orders:

1. [Spent]

2. THAT leave be granted to the Applicant to cite the Defendant/Respondent herein for contempt of court for disobeying court orders.

3. THAT the court be pleased to cite one LUKA NDALUSIA YESWA, the Defendant/respondent for contempt of court for disobeying the lawful court order given on 23<sup>rd</sup> June 2020 and issued on 10<sup>th</sup> July 2020 ordering him, his agents, representatives, servants and or any other person acting on his authority from trespassing, entering, utilizing, and/ or in any other manner from interfering with the plaintiff's peaceful use of his parcel of land No. BUTSOTSO/INDANGALASIA/5663.

4. THAT upon prayer (3) herein above being granted, LUKA NDALUSIA YESWA the Defendant/Respondent be committed to jail for a duration not exceeding six months, fine or both and or such other duration that the court may deem fit and expedient.

5. THAT the costs of this application be provided for.

3. The application is supported by an affidavit sworn by the plaintiff/applicant. He deposed that the defendant/respondent has disobeyed orders made on 23<sup>rd</sup> June 2020 despite being properly served with the said orders and being aware of their existence. He further deposed that the respondent has continued interfering with his peaceful use of the suit property by the respondent's continuous activities of utilising the whole of the said property by cultivating sugarcane therein and threatening the plaintiff never to set foot on the property. The applicant annexed to the affidavit in support of the application copies of decree issued on 10<sup>th</sup> July 2020 and an affidavit of service.

4. Although there was evidence of service upon the respondent of the application, the respondent neither filed a response nor attended court at the hearing of the application. Counsel for the applicant therefore urged the court to allow the application.

5. I have considered the application and the affidavit in support. Contempt of court proceedings are quasi criminal in nature since the alleged contemnor is bound to lose his liberty or property if found to be in contempt. Consequently, the standard of proof of contempt is higher than a balance of probabilities. In **Mutitika v Baharini Farm Ltd (1985) KLR 227**, the Court of Appeal stated that 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. It follows therefore that for the applicant to succeed in the present application, he has to establish to a degree beyond a balance of probabilities that the

respondent wilfully disobeyed the order that was made herein on 23<sup>rd</sup> June 2020.

6. Even though the respondent did not respond to the application, the aforesaid burden of proof still remains upon the applicant. The terms of the order said to have been disobeyed were that the respondent, his agents, relatives, servants and assigns were restrained by way of permanent injunction from trespassing, entering, utilizing, and/or in any other manner from interfering with the applicant's peaceful use of the parcel of land known as Butso/Indangalasia/5663.

7. The alleged manner of disobedience is that deposed that the respondent has continued interfering with the applicant's peaceful use of the suit property through the respondent's continuous activities of utilising the whole of the suit property by cultivating sugarcane therein and threatening the applicant never to set foot on the property. I note that no dates of the alleged events are provided and no additional evidence such as photographs are availed to show cultivation of the sugarcane. But that is not the main challenge facing the application.

8. The affidavit of service sworn on 29<sup>th</sup> September 2020 by the process server Michael Khisa Wekesa is to the effect that he received copies of decree from the applicant's advocates with instructions to effect service on the defendant. That on 15<sup>th</sup> September 2020 in the company of the applicant herein, he went to Okumu area where the defendant resides and that they found the defendant/respondent's wife who informed them that the defendant had left for work. He added that the wife accepted service on behalf of the defendant but declined to sign in acknowledgment.

9. From the foregoing account by the process server, it is not clear whether the respondent was aware of the court order he is accused of disobeying. I have perused the record and I note that the judgment was delivered through e-mail and I cannot therefore ascertain that the respondent was aware of the terms of the judgment. Needless to state, the duty to prove both knowledge of the order and disobedience thereof, to the required standard which is higher than proof on a balance of probabilities and almost but not exactly beyond reasonable doubt, is upon the applicant.

10. In view of the foregoing, I am not persuaded that the respondent had knowledge of the existence of the court order of the 23<sup>rd</sup> June 2020 or that he wilfully disobeyed it. The applicant has not satisfied the requisite standard of proof. That being the case, Notice of Motion dated 1<sup>st</sup> October 2021 lacks merit and I therefore dismiss it. Since the respondent did not resist the application, I make no order as to costs.

**DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 26<sup>TH</sup> DAY OF APRIL, 2022**

**D. O. OHUNGO**

**JUDGE**

Delivered in open court in the presence of:

Ms Wambani holding brief for Mr Khayumbi for the plaintiff

No appearance for the defendant

Court Assistant: E. Juma