



REPUBLIC OF KENYA

HIGH COURT AT NAIROBI (NAIROBI LAW COURTS)

ENVIRONMENTAL & LAND CASE 19 OF 2001

LAWRENCE NJAU.....PLAINTIFF

VERSUS

GRACE WANJIKU KAIRU Legal Representative of JOSEPH

KAIRU (Deceased).....1ST DEFENDANT

EMBAKASI RANCHING COMPANY LIMITED.....2ND DEFENDANT

RULING

1. Coming up for determination before me is a Notice of Motion dated **18th December, 2012** brought by the Plaintiff under Order 40 Rule 1(a), 2(1) and (2) and 3 (1), 4(1) and (2) of the Civil Procedure Rules. In it are prayers for an injunction order restraining the 1st Defendant from constructing a timber house or church on the Plaintiff's plot No. 7886 formerly a portion of Plot No. B201 (**the "suit property"**). Another prayer made in the said application is that the Court grant leave to the Plaintiff to commence contempt proceedings for her contempt of the Court's orders issued on 10th November, 2009 and 15th October, 2001.

2. The Application is supported by an Affidavit of Mr. Lawrence Njau sworn on 18th December, whereby Mr. Njau avers that the Court ordered the Defendants not to interfere with the suit property on 10th November, 2009. A copy of the cited Court order was attached. It carries the Penal Notice Overleaf. He further sworn that the Court had issued an earlier order dated 15th October, 2001 barring the Defendant from conducting any construction on the suit property. The cited order is annexed and carries the Penal Notice Overleaf. Attached is an Affidavit of service which testifies at clause 6 as follows:

"That on 31st October, 2001, I served the same copy of order with a Penal Notice upon the Defendant herein at his home in Ruai, Embakasi."

Noteworthy is the fact that this service was upon Mr. Joseph Kaire and not upon his wife who now stands as the 1st Defendant being the legal representative of the now late Joseph Kairu.

Also noteworthy is the fact that according to the Affidavit of service of Robert M. Mutuku, the Court order dated 10th December, 2009 was served upon the 1st Defendant personally.

In the Affidavit in support of this application, Mr. Lawrence Njau the Plaintiff herein avers that when he paid a visit to the suit property on 10th December, 2012, he found the 1st Defendant supervising the

construction of a timber church thereon. He states that upon furnishing the 1st Defendant with the two Court order cited above, she disregarded the same citing them to be fake and continued with the construction on the suit premises undeterred.

3. The application is contested. The 1st Defendant filed her Replying Affidavit dated 21st January, 2013. In it she avers that **Plot No. B 201** which is also **G399B** was left to her by her late husband. She avers that she and her late husband dwelt on the suit property peacefully until 2009 when the Plaintiff began claiming the same plot. She rejects the statement that she was personally served with the Court order dated 15th October, 2001. She swore further that the Plaintiff had increased the width of his plot which is adjacent to the suit property, a fact she reported to the police. She averred that she was approached by member of Siloam Gospel Center requesting for a place to gather for worship and she allowed them to erect a temporary structure on the suit property. She denied that she had acted in contempt of the Court orders.

4. It is now trite law that for an application for committal of anyone to prison for contempt of Court to succeed, there must have been personal service of the order in question as well as a Penal Notice upon the alleged Contemnor. See for instance the case of **LOISE MARGARET WAWERU Versus STEPHEN NJUGUNA GITHURI** Court of Appeal at Nairobi, **Civil Appeal No. 198 of 1998** (unreported).

In the present case, both Orders contained a Penal Notice on the reverse side. However, the evidence points to the fact that the 1st Defendant was not served the Court order dated 15th October, 2001 personally. This order was served upon her late husband. However, evidence shows that she was served the Court Order dated 10th December, 2009 personally.

5. It is the law as I know it that contempt of Court is akin to a Criminal offence as a jail term may be meted out if contempt is proved. In **MUTITIKA Versus BAHARINI FARM LIMITED (1985) KLR 227** it was held as follows:-

(i) 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 a contemnor has to be proved with such strictness of proof as is consistent with the gravity of the charge.

(ii) The principle must be borne in mind that the jurisdiction to commit for contempt should be carefully exercised with the greatest reluctance and anxiety on the part of the Court to see whether there is no other mode which can be brought to bear on the contemnor.

6. The Court finds it ridiculous that the applicant waited 12 years in respect of the Court order dated 15th October, 2001 and 3 years in respect of the Court order dated 10th December, 2009 in order to commence contempt of Court proceedings. If there was a breach of the orders, he should have pursued the issue then.

7. This is a very old matter which should have proceeded the hearing of the main suit a long time ago to finally address the real issues for determination in this case. However, instead of pursuing this, the Plaintiff has preferred to lodge one after another interlocutory application. It is on the interest of all parties that this matter be allowed to proceed to full hearing on an urgent basis.

8. On the issue of the prayer for an interlocutory injunction, this matter has been canvassed twice during the lifetime of this case and the Court issued the Order sought. It would therefore be an exercise in futility to revert to that well settled issue.

In view of the above reasons the application is dismissed with no order as to costs.

SIGNED & DELIVERED ON THE 15TH DAY OF MARCH 2013.

MARY M. GITUMBI

JUDGE