



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT & LAND CASE NO.152 OF 2008

GEORGE AYADHO ARUTI.....PLAINTIFF

**VERSUS**

TOBIAS OGWORA ODEDO..... DEFENDANT

RULING

1. The plaintiff brought this suit against the defendant on 13<sup>th</sup> November, 2008 seeking an order of a permanent injunction to restrain the defendant from alienating, leasing, entering, taking possession or in any manner howsoever dealing with all that parcel of land known as **LR. No. Suna West/Wasweta II/ 2640** (hereinafter referred to as “**the suit property**”). The plaintiff claimed that he is the registered proprietor of the suit property and that the defendant without any lawful excuse had trespassed on the same thereby interfering with the plaintiff’s use of the said property. The plaintiff claimed that he tried to have the dispute arbitrated through the provincial administration but the defendant did not comply with the decision of the arbitrators leaving the Plaintiff with no alternative but to file this suit. Together with the plaint, the plaintiff filed an application by way of Chamber Summons dated 10<sup>th</sup> November, 2008 seeking a temporary injunction to restrain the defendant from occupying, disposing, alienating, leasing and/or trespassing on the suit property or in any manner causing further waste on the suit property pending the hearing and determination of this suit. The Plaintiff’s application was certified as urgent on 14<sup>th</sup> November, 2008 and set down for mention inter partes on 20<sup>th</sup> November, 2008. On 20<sup>th</sup> November, 2011, Musinga J. (as he then was), ordered the parties to maintain status quo and fix the application for hearing at the registry. The order was made in the presence of the advocate for the plaintiff and the defendant who appeared in person. The plaintiff’s application for injunction was brought on the grounds that the plaintiff is the registered proprietor of the suit property and that the defendant had trespassed on the suit property and was planning to carry out physical developments on the suit property without the plaintiff’s permission. The plaintiff claimed that the defendant had in fact purported to lease a portion of the suit property to third parties. The plaintiff contended that the defendant’s activities aforesaid amounted to interference with the plaintiff’s quiet enjoyment of the suit property. The defendant filed an affidavit in reply to the Plaintiff’s application in which he denied that he had trespassed on the suit property. The defendant claimed that his activities were restricted to his parcel of land known as LR. No. Suna West/Wasweta II/2369 (hereinafter Plot No. 2369) and that he had nothing to do with the suit property. From the record, it seems as if the plaintiff’s application for injunction has to date not been heard.
2. The application before me has been brought by way of Notice of Motion dated 8<sup>th</sup> March, 2010. In this application which is the subject of this ruling, the plaintiff has sought an order for the committal of the defendant to civil jail for contempt of court. The application is supported by the affidavit of the plaintiff in which he has stated that on 20<sup>th</sup> November, 2008, the court had ordered the parties herein to maintain status quo which order has been disobeyed by the defendant. The plaintiff claimed that despite of the existence of the said order that was made in the presence of the defendant, the defendant has continued with his acts of trespass on the suit property by cultivating the same and leasing portions thereof to third parties. The plaintiff claimed that the defendant was in the process of selling a portion of the suit property. The plaintiff contended that the defendant’s actions aforesaid are a challenge to the courts authority and should be punished so as to restore the

dignity of the court. The Plaintiff annexed to his affidavit in support of the application, photographs of maize plantations and a residence. The plaintiff's application was opposed by the defendant. Through a replying affidavit sworn on 12<sup>th</sup> February, 2010, the defendant denied breaching the order of status quo that was made on 20<sup>th</sup> November, 2008. The defendant maintained that his activities were restricted to his Plot No. 2369 which is the position that was prevailing when the status quo order was made. He denied trespassing on the suit property and carrying out the activities complained of by the Plaintiff.

3. When the application came up for hearing before me on 1<sup>st</sup> July, 2013, the defendant's advocates did not appear in court. After satisfying myself that the defendant had been served with a hearing notice, I allowed the plaintiff's advocate to argue the application in the absence of the defendant. Mr. Kwanga, advocate who appeared for the plaintiff submitted that the application was seeking an order to commit the defendant to civil jail for contempt of court. Counsel relied entirely on the contents of the plaintiff's affidavit in support of the application. Counsel submitted that the defendant had continued to utilize a parcel of land that the surveyor had found to be falling within the suit property. Counsel termed the defendant's replying affidavit as full of lies as there is substantial evidence to the effect that the defendant has breached the order of 28<sup>th</sup> November, 2008. Counsel urged the court to allow the plaintiff's application. I have considered the plaintiff's application and the opposition thereto by the defendant. This is my view of the matter. It is now well settled that contempt of court proceedings are quasi criminal in nature because the contemnor is bound to lose his liberty if found guilty of the contempt complained of. In view of this, the standard of proof of contempt is higher than proof on a balance of probability. See the holding in the court of appeal case of, **Mutitika -vs- Baharini Farm Ltd. (1985) KLR 227**, where the court stated that the standard of proof in contempt proceedings must be higher than proof on a balance of probability, and almost but not exactly, beyond reasonable doubt. It follows therefore that for the plaintiff to succeed in this application, the plaintiff has to satisfy the court to a degree beyond a balance of probability that the defendant has disobeyed the order of the court issued herein on 28<sup>th</sup> November, 2008. As I have stated hereinabove, the said court order directed the parties to maintain status quo. That in my view meant that the parties were to maintain their respective positions that were in existence or prevailing as at the date of the said order. The plaintiff had moved the court for an order of injunction to restrain the defendant from trespassing into the suit property. In his affidavit in support of the injunction application, the plaintiff had claimed that the defendant had entered the suit property and cleared a substantial portion thereof with a view to carrying out development thereon. The defendant was also accused of leasing out a portion of the suit property to third parties. The defendant had denied the plaintiff's claims and maintained that his activities were on his parcel of land. That being the status quo that was prevailing namely, the plaintiff claiming that the defendant had trespassed on the suit property and the defendant claiming that his activities were restricted to his own parcel of land namely, Plot No. 2369, the court order of 28<sup>th</sup> November, 2008 can only be interpreted to have maintained that position. The order did not restrain the defendant from continuing with the activities that he was carrying out on the parcel of land that the plaintiff claimed to fall within the suit property and the defendant claimed otherwise. For the defendant to be guilty of disobedience of the said court order, the plaintiff has to prove that the defendant had entered into other portions of the suit property that he had not entered as at the date when the order of status quo was made. In paragraphs 7 and 8 of the plaintiff's affidavit in support of the application herein, the plaintiff has complained of the defendant trespassing and continuing to trespass through his brothers on the "disputed land". As I have stated above, the court did not restrain the defendant from entering the parcel of land in dispute between the parties herein. The plaintiff's advocate in his submissions had argued that the portion of land in dispute has been determined by a surveyor to belong to the plaintiff. That may be the case but the issue here is did the court order of 28<sup>th</sup> November, 2008 restrain the defendant from entering the same? My answer is no. Furthermore, the report that the plaintiff's advocate referred me to was prepared on 21<sup>st</sup> October, 2010 while the application herein was filed on 10<sup>th</sup> November, 2009. I don't think the defendant can be held in contempt on state of facts that were not in existence as at the date when the contempt is alleged to have been committed. Due to the foregoing, I am not satisfied that the plaintiff has proved the charge of contempt against the defendant to the required standard.

4. The upshot of the foregoing is that the plaintiff's application for committal of the defendant to civil jail dated 10<sup>th</sup> November, 2009 that was filed on the same date and a similar application dated 8<sup>th</sup> March, 2009 that was filed on 8<sup>th</sup> March, 2010 which were based on the status quo order of 28<sup>th</sup> November, 2008 are not for granting. The same are hereby dismissed with costs to the defendant. The plaintiff is advised to take necessary to bring this old case to final conclusion.

**Delivered, dated and signed at KISII this 29<sup>th</sup> day of November 2013.**

**S. OKONG'O**

**JUDGE**

**In the presence of:-**

N/A for plaintiff

N/A for defendant

Mobisa Court Clerk.

**S. OKONG'O**

**JUDGE**