



REPUBLIC OF KENYA

High Court at Meru

Environmental & Land Case 2 of 2012

ZIPPORAH NKOYAI.

HENRY.....PETITIONER

VERSUS

**JAMES KABERIA M'ITWAMWARI..... 1ST
RESPONDENT**

**THE LAND ADJUDICATION OFFICER TIGANIA EAST AND WEST DISTRICTS.....2ND
RESPONDENT**

**ATTORNEY GENERAL..... 3RD
RESPONDENT**

RULING

The application herein was filed under Articles 48, 159 and 165 of the Constitution of Kenya and Order 40 Rule 3(1) and (3) of the Civil Procedure Rules 2010 and Sections 1A, 1B, 3A and 63 of the civil Procedure Act. It is dated 15th October, 2012. The application sought 5 orders as outlined on the face of the Notice of Motion.

The matter was referred to this Court by Hon. Justice J. A. Makau, J. on 6.11.2012. At the beginning of the Court proceedings, Mr. Wamache holding brief for Mrs. Kaume for the respondents sought an adjournment of the hearing on the ground that Mrs Kaume was indisposed and therefore unable to proceed. He also pointed out that Mrs Kaume had filed a Preliminary Objection on 23rd October, 2012.

Mr Mbaabu for the petitioner/Applicant opposed the adjournment sought on the ground that there was no evidence to show that Mrs. Kaume was indisposed as alleged. He averred that the advocate holding brief ought to have received full and adequate instructions to proceed with the matter since Mrs Kaume had replied to the matter by way of a Preliminary Objection and a replying affidavit as required under Order 51 rule 14 of the Civil Procedure Rules

Mr. Mbaabu pointed out that, in the firm of M. G. Kaume K. & Company Advocates, there was Mr. Kaume who was an advocate working in the same firm and he could easily have replaced Mrs Kaume in the hearing of this application. He also complained and pointed out to the Court that the respondent had adjourned this matter on several occasions while, he alleged, physically harassing the petitioner and threatening to throw her out of the suit land. He felt that the application for adjournment was a delaying tactic, and more so, since the Court's Christmas Vacation was approaching. Hence the respondent would get enough time to evict the petitioner from the suit land.

Mr. Mbaabu informed the Court that when the parties appeared before Hon. Justice Makau on 24th November, 2012, the respondent leaned on abandoning the Preliminary Objection aforementioned as the advocate representing him applied for leave to reply to the application dated 15th October, 2012. Mrs Kaume, the advocate, also agreed to the hearing of this application on 6th December, 2012. According to Mr. Mbaabu this amounted to constructive abandonment of the preliminary objection.

Having assessed the arguments of the Advocates for the applicant and the 1st respondent, the application for adjournment was denied. The Court ordered that the application dated 15th October, 2012 be heard.

In prosecuting his application, Mr. Mbaabu stated that he was asking for orders in terms of prayers 1 to 6. He was relying on the grounds set out on the face of the motion, the supporting affidavit sworn by the petitioner on 15th October, 2012 and all exhibits annexed thereto. He was also relying on a supplementary affidavit sworn by the applicant on 3rd December, 2012 pursuant to leave of the Court. He stated that the petitioner/applicant was granted an interim temporary injunction on 27th

March, 2012, which was extended on 23rd April 2012, on 7th May, 2012, on 10th July, 2012 and on 24th October, 2012 when this hearing date was given. He pointed out that this order was extended in the presence of the 1st respondent and his Counsel without any opposition at all.

Notwithstanding the fact the orders were extended in the presence of the 1st respondent and his Counsel, Mr. Mbaabu stated that on various dates the 1st respondent had been marshaling his agents and had forcibly harvested the applicant's beans and maize on the suit land as evidenced in terms of Police Occurrence Book reports and various annexures to the applicant's supporting affidavit. More particularly, on 23rd August, the 1st respondent and his agents forcibly tilled about 1½ acres of the applicant's land. On 26th June, 2012 and on 29th September, 2012, Mr. Mbaabu stated that he wrote letters to the 1st respondent's advocate, requesting her to advise her client to obey Court Orders. The letters, however, did not bear any positive fruits. And to worsen matters, according to Mr. Mbaabu, on 11th October, 2012, the 1st respondent and his agents forcibly planted on a portion of the suit land which the applicant had previously planted on. A report was made to police at Mikinduri Police Station in terms of Police Occurrence Book report entry marked ZN 7 annexed to the supporting affidavit.

Mr. Mbaabu stated that this Court had powers to ensure compliance of its orders which were in force and had not been set aside through review or appeal. He explained that his power was donated to the Court by Order 40 rule 3 sub-rules 1, 2 and 3 of the Civil Procedure Rules, by Sections 1A, 1B, 3A and 63 of the Civil Procedure Act and by Sections 159 and 165 of the Constitution of Kenya.

According to Mr. Mbaabu, if the 1st respondent had been dissatisfied with the Order of the Court, the option should not have been to disobey the order but to pray for review or setting aside the order or to appeal against it. According to Mr. Mbaabu, this he did not do.

Mr. Mbaabu then dealt with the replying affidavit of the 1st respondent sworn on 22nd November, 2012. He pointed out that the 1st defendant does not deny that the order in issue was not served upon him. Instead, his is a mere denial that does not deny that on specific dates in the supporting affidavit himself and his agents caused acts of disobedience complained of. He does not state where he was on the mentioned dates except on the suit land. Mr. Mbaabu further submitted that the allegations by the 1st respondent as contained in his replying affidavit had been controverted by the applicant's supplementary affidavit which had not been challenged. In the circumstances, Mr. Mbaabu prayed that the 1st respondent be punished for disobedience of a Court Order so that he can set an example to other citizens. This will also uphold the revered dignity of the Court.

Mr Wamache, for Mrs. Kaume, for the 1st respondent replied to Mr. Mbaabu's arguments by stating that Order 51 rule 14 sub-rule 1 states that:

“any respondent who wishes to oppose any application may file any one or a combination of the following documents.

- (a) a notice of preliminary objection, and, or;**
- (b) replying affidavit, and or**
- (c) a statement of grounds of opposition.**

He pointed out that Mrs Kaume had filed a Notice of Preliminary Objection together with a replying affidavit. He also pointed out that Mrs Kaume had filed an application dated 22nd November 2012 but filed on 4th December, 2012 which prayed for Orders:

- “(a) That this honourble court be pleased to discharge/vary or set aside
the exparte Order of Injunction issued on 13th July, 2012 as
against the applicant or in the alternative substitute the said orders
with orders of status quo.**
- (b) That costs of this application be provided for.”**

Mr. Wamache stated that Mrs Kaume would entirely rely on the 3 documents. He then closed the 1st respondent's case in this application. The date given as 13.7.2012 does not tally with the court records.

The court noted that neither the Preliminary Objection nor the application dated 22nd November, 2012 but filed on 4th December, 2012 had been prosecuted by the counsel for the 1st defendant. But since the counsel for the 1st defendant had stated that she would entirely rely on the replying affidavit, the preliminary objection and the application dated 22nd November 2012 but filed in Court on 4th December 2012, I will reluctantly open the preliminary objection and the application dated 22nd November 2012, though both have not been prosecuted, and the application of 22nd November, 2012, even on exparte basis, for examination.

The Notice of Intention to raise objection on a preliminary point of law states that the respondents shall raise a preliminary objection on a point of law seeking to have the application dated 15.12.2012 struck out on the following grounds

- “1. That the Application dated 15.10.2012 is fatally defective, an abuse of the Court process and bad in law.**
- 2. That there are no orders of injunction in force capable of being breached and or defied.**
- 3. That the orders of injunction issued on 13th March, 2012 have already lapsed and by operation of the law are incapable of being extended.**
- 4. That the application offends the mandatory provision of the civil procedure rules.”**

As already seen, the preliminary objection has not been argued before the court but it is one of the documents the respondent's advocate relied upon to oppose this application.

The application by the Petitioner/applicant dated 15th October, 2012 seeks orders:

- “1. That the application be certified urgent and it be slated for inter-pates hearing on priority basis**
- 2. That pending interpartes hearing of the application, the officer Commanding Mikinduri Police Station be empowered to enforce the order of injunction issued here in on**

13.0.3.2012 and subsequently extended on 27.03.2012, 23.04.2012, 07.05.2012 and 10.07.2012 by ensuring that the 1st respondent JAMES KABERIA M'ITWAMBARI and his representatives, agents, servants, employees or anybody else acting at his behest, direction or instruction do not interfere with the petitioner's/Applicants, ZIPPORAH NKOYAI HENRY'S quiet, exclusive and actual cultivation, user and enjoyment of land P/Nos.1458, measuring about 3.6 acres and 8206, measuring about 3.15 acres both situate in Antuamburi Adjudication Section.

3. That alternatively, pending inter-partes hearing of the application, the 1st respondent, JAMES KABERIA M'ITWAMWRI be ordered to personally appear in Court and show cause why he should not be punished for his disobedience of order of injunction issued herein on 13.03.2012, and subsequently extended on 27.3.2012, 23.04.2012, 7.05.2012 and 10.07.2012.

4. That an order be issued, for arrest and detention in prison and/or for payment of a fine, against the 1st respondent for disobedience of the order of injunction issued herein on 13.03.2012, and subsequently extended on 27.03.2012, 23.04.2012, 7.05.2012 and 10.07.2012.

5. That alternatively, an order be issued, for attachment and sale of the properties of the 1st respondent for disobedience of the order of injunction issued herein on 13.03.2012, and subsequently extended on 27.03.2012, 23.04.2012, 07.05.2012, and 10.07.2012, and the petitioner/applicant be compensated with the proceedings therefrom.

6. That costs of the application be provided for.

The 1st respondent's advocate in her Notice of Intention to Raise Objection dated 23rd October, 2012 claims that there are no orders of injunction in force or capable of being breached and or defied. She also claims that the orders issued on 13th March, 2012 have already lapsed and by operation of the law are incapable of being extended. She finally claims that the application offends the mandatory provision of the civil procedure rules. However in her unprosecuted application dated 22nd November, 2012, she admits existence of an ex parte order of injunction issued on 13th July, 2012 and seeks for an order that the injunction in question be discharged/varied or set aside. In the alternative she seeks that the order of injunction be substituted with orders of status quo.

It has not been disputed that the Hon. Justice J. A. Makau, J. issued an order of injunction on 13.03.2012. It has also not been disputed that the order was extended on 27.03.2012, 23.04.2012, 07.05.2012 and 10.07.2012 with the full acquiescence and participation of the 1st respondent and his advocate in Court. Indeed in her unprosecuted application dated 22nd November, 2012, which

application the respondent adduces in opposition of this application, the 1st respondent's advocate admits that an ex parte order of injunction issued on 13th July, 2012 exists. This is why she wants the court to discharge, vary or set it aside. Its admitted existence by the respondent's advocate must be by way of extension.

Order 40 deals with extension of ex-parte injunctions. Courts of justice must however not be seen to be acting and/or moving in vain. In my view, the mischief created by strict non-adherence to the strictures of order 40, which is contained in subsidiary legislation promulgated under the Civil Procedure Act, is cured by Section 63 of the civil Procedure Act which says:

“63. In order to prevent the ends of justice from being defeated the court may, if it is so prescribed -

(a) (b);

- (c) **grant a temporary injunction and in case of disobedience commit the person guilty thereof to prison and order that his property be attached and sold;**
- (e) **make such other interlocutory orders as may appear to the court to be just and convenient.**

It is this Court's view that the extensions of the Order of Injunction issued on 13th March 2012, are made in conformity with provisions of Section 63 of the Civil Procedure Act. These provisions override those of the subsidiary legislation. In any case, the 1st respondent through his application dated 22nd November 2012 admits that much by seeking to have the exparte order of injunction issued on 13th July, 2012, which was by extension, be discharged or varied or set aside. This is as it should be, as the respondent and his advocate all along acquiesced to various extensions by the Court.

The applicant has demonstrated instances of disobedience by the 1st respondent, either alone or with others, of a Court Order. In the court's view, he has in his pleadings and in the oral submission made on his behalf by the advocate holding brief for his advocate on record failed to controvert the

Petitioner/Applicant's assertions that he had disobeyed a Court Order. In the circumstances, I find that he has, on a number of times, disobeyed a Court Order. To protect the dignity of the court proper measures should be taken.

It is Ordered:

(1) That pending inter-partes hearing of this application, the 1st respondent, **JAMES KABERIA M'ITWAMARI** be ordered to personally appear in Court and show cause why he should not be punished for his disobedience of the order of injunction issued herein on 13.03.2012 and subsequently extended on 27.03.2012, 07.04.2012 07.05.2012 and 10.07.2012.

(2) That in accordance with Section 63 of the Civil Procedure Act, in order to prevent the ends of Justice from being defeated, an interlocutory order in terms of the Order issued by Hon. Justice J. A. Makau, J. on 13.3.2012 be issued to the effect that pending hearing of this suit, an order of injunction be and is hereby issued, restraining the 1st and 2nd respondents and their representatives/successors, agents, servants, employees or anybody else acting at their behest, direction or instruction from entering into, excising any portion of land from, and/or tampering with, or altering the map sheet and/or adjudication register/records for land parcel No.1458 and 8206 in Antuambari Adjudication Section, within Tigania East District, to create another parcel number therefrom, and/or whatsoever interfering with the petitioner's/applicant's quiet, peaceful, undisturbed, uninterrupted, exclusive and actual possession, cultivation, user enjoyment of land parcel Nos. 1458 measuring about 3.3.6 acres and 8206 measuring about 3.15 acres, both situate in Antuamburi Adjudication Section.

(3) That the officer commanding Mikinduri Police Station enforces Order 2 above and herein.

(4) Costs for Petitioner/Applicant

Written and signed in Meru on 14th December 2012.

P. M. NJOROGE
JUDGE

Coram: Kaume for respondents

Ruthugua HB Mbaabu for petitioners

**DELIVERED IN OPEN COURT AND SIGNED AT MERU THIS 20TH DAY OF DECEMBER,
2012.**

**P. M. NJOROGI
JUDGE**