REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 445 of 2006

HANNAH NJERI GICHATHA …………………………………..PLAINTIFF

V E R S U S

1. **WILLIAM KAMAU GICHATHA**
2. **DAVID MAINA GICHATHA …………………………….DEFENDANTS**

R U L I N G

Land parcel No. LOC.15/Gathukiini/528 in Muranga is registered in the name of the Plaintiff. On 2nd May, 2006 she filed this suit against the Defendants claiming that they had, in or about 2005, unlawfully, unreasonably and without permission or authority trespassed on the land and begun to construct their residential houses thereon. They had not heeded demand to stop their illegal acts. The plaint was filed for injunction, permanent injunction and general damages.

With the suit, was filed an application under **Order 39 rules 1, 2, 2A** and **3** of the **Civil Procedure Rules** and **sections 3A** and **63(e)** of the **Civil Procedure Act** for interlocutory injunction and for a demolition order. In the supporting affidavit, the Plaintiff indicated she was the step-mother of the Defendants who, in 2004, begun heaping materials on the land wanting to build a house thereon. In late 2005 she found they had begun constructing a house. On 16th December, 2005 she found the 1st Defendant had cautioned the land. She deponed that the Defendants have no proprietary or equitable interest in the land.

The Defendants filed a defence and counterclaim. They denied that the Plaintiff was the absolute owner of the land, and claimed she is registered to hold the land in trust for herself and them as tenants in common in equal shares. Their further and alternative claim was

that they have, since 1964, had uninterrupted possession of the land and have therefore acquired title to it by adverse possession. Alternatively, the Plaintiff's title has been extinguished pursuant to the provisions of the **Limitation of Actions Act**. The Defendants further plea was that the Plaintiff had obtained registration to the land by fraud. The particulars were enumerated. The replying affidavit to the application repeated this line of defence.

The application was heard by Justice M. G. Mugo, who on 31st August, 2007 delivered a ruling allowing the prayer for interlocutory injunction. As regards prayer 2 for demolition, the court declined to grant it and went on to ask that the Defendants do maintain *status quo* and abide with the restraining order.

The extracted orders read as follows:-

> **"1. THAT an interlocutory injunction be and is hereby issued and directed against the 1st and 2nd Defendants restraining them or their servants or agents or howsoever from constructing houses on or trespassing onto, or working on land reference number Loc.15/Gathukiini/528 or in any other way dealing with the said land reference pending he hearing and determination of this suit.**
>
> **"2. THAT the Defendants are hereby ordered to maintain *status quo* and abide with the restraining orders hereby granted against them."**

There is no dispute that Defendants were in court when the orders were granted and the same were subsequently served. The order, was however, not served with a notice informing the Defendants that if they disobeyed the order they were liable to be punished. Mr. Kigano for the Defendants took up this issue and urged the court to find that without the penal notice having been served on his clients they could not be cited for contempt. The Plaintiff filed this contempt proceedings seeking that the Defendants be detained in prison for a period not exceeding six months and such of their properties be attached because they had disobeyed the order issued by the court. He swore that despite the order having been served, the:

> **"Defendants are not only on the land residing thereon and constructing, they have hired agents, whom they have instructed to kill me in the event I set foot on the said land."**

The 1st Defendant swore a replying affidavit on his behalf and that of the 2nd Defendant. Their case was that they had in 2005 begun to construct on the land, but that after they were stopped none of them had undertaken any further construction. The Defendants stated that they have been on the land since 1964, that in 1983 their late father (the husband of the Plaintiff) allocated them the portion on which they are presently. The Defendants deponed that they understood the order to mean that they continue on he land, as they were before the suit was filed. Mr. Kigano argued that the orders served were neither clear nor unambiguous on their face. Mr. Nyangau appeared for the Plaintiff and his contention was that the orders were clear and unambiguous.

I have considered the written and oral submissions of counsel and the authorities cited by either side.

It is essential for the maintenance of the rule of law and proper and orderly administration of justice that court orders are respected by all and sundry at all times. (See **REFRIGERATOR & KITCHEN EQUIPMENT UTENSILS LTD –VS- GULABCHAND SHAH & OTHERS**, **Civil Application No. 39 of 1990 at Nairobi**). In the case of **HADKINSON VS- HADKINSON [1952] 2 All ER 567**, it was held that:-

> **"It is plain and unqualified obligation of every person against or in respect of, who an order is made by court of competent jurisdiction to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extents even to cases where the person affected by an order believes it to be irregular or even void."**

The Plaintiff claims that the orders issued to her against the Defendants have been deliberately disobeyed and seeks that the Defendants be punished for this. The Defendants are saying that, first, they have not disobeyed the orders and, secondly, that the orders were not clear or unambiguous as they have been on the land since 1964 and understood the orders to be saying that they remain on the land until the suit is heard and finalized. They rely on the second limb of the order which asked that status quo be maintained and the Defendants do abide by the restraining order. Assuming that the orders were clear and unambiguous, has the Plaintiff demonstrated that the orders were indeed disobeyed? Mr. Kigano submitted that the standard of proof required in contempt proceedings is beyond all reasonable doubt. He argued that such high standard is required because punishment for contempt is criminal in nature. Counsel relied on the Court of Appeal decisions in **NYAMODI OCHIENG – NYAMOGO AND ANOTHER –Vs- KENYA POSTS & TELECOMMUNICATIONS CORPORATION, Civil Application No. 264 of 1993 at Nairobi; OCHINO & Another –Vs- OKOMBO & 4 OTHERS [1989] KLR 65** and **MWANGI WANGONDU –Vs- NAIROBI CITY COMMISSION, Civil Appeal No. 95 of 1988** at Nairobi**.** All these decisions held that the court will only punish as contempt for a breach of injunction if satisfied that the terms of the injunction are clear and unambiguous, that the Defendant has proper notice of the terms and that breach of the injunction has been proved beyond reasonable doubt. It was also held that the copy of the order served must be endorsed with a notice informing the person on whom the copy is served that if he disobeys the order, he is liable to the process of execution to compel him to obey it. Mr. Kigano further relied on **Halsbury's Laws of England, 4th Edition, Volume 9, page 40, paragraph 66** and **Atkin's Court Forms, 2nd Edition, Vol. 12 at page 114.**

Mr. Nyangau referred to a number of authorities, but the relevant one on standard of proof was the Court of Appeal decision in **REFRIGERATOR & KITCHEN UTENSILS LTD** (above) which cited with approval its earlier decision in **GATHARIA MUTITIKA –Vs- BAHARINI FARM LTD [1985] KLR 227** in which it was held that in cases of alleged contempt, the breach for which the alleged contemnor is cited must not only be precisely defined but also proved to a standard which is higher than proof on a balance of probabilities but not as high as proof beyond reasonable doubt. The court noted that:-

> **"The standard of proof beyond reasonable doubt ought to be left where it belongs, to wit, in criminal cases. It is not safe to extend it to offence which can be said to be quasi- criminal in nature….."**

This court will follow this decision. It is dealing with a civil case, but where there is alleged disobedience of its order and the law has provided for a punishment that is criminal in nature. The proceedings are therefore quasi – criminal in so far as the standard of proof of the alleged contempt is concerned.

I agree with Mr. Kigano that the alleged breach has to be defined in precise terms. Since the proof is strict, particulars of the alleged breach have to be sworn to in the supporting affidavit with sufficient particularity to enable the alleged contemnor to defend himself. **(See ABDULLAH DADACHA DIMA –VS- ARID LANDS RESOURCE EXPLOITATION & DEVELOPMENT, HCCC NO.1322 OF 2003 at Nairobi).** In this case, the Plaintiff swore that, since the orders, the Defendants are not only residing on the land but are also constructing thereon. The Defendants denied that they have continued to construct on the land since they were stopped by the orders. The burden was on the Plaintiff to show that construction has continued beyond what there was in 2005. She had on 3rd February, 2006 in her affidavit in support of her application for injunction that in late 2005 she had found the Defendants constructing on the land, after they had

heaped building materials in 2004. One would want to know how far the construction had gone in 2005 before the injunction, and whether it was any different on 16th June 2008 when the affidavit to support the present application was sworn. Photographs of the construction in 2005 and in 2008 would probably have helped the Plaintiff.

The Plaintiff claimed that the Defendants have failed to leave the land in dispute since the orders in question. To this, the Defendants stated that they always, since 1964, been on this land. There is no dispute that they have not vacated the land since the orders. Mr. Kigano's contention was that the orders did not provide for their eviction. It is also true that the Plaintiff did not pray for, or obtain, a mandatory injunction against the Defendants. The orders restrained the Defendants from constructing on the land, trespassing thereon, working on it, or in any other way interfering with the land. The Defendants were then ordered to maintain the status quo and abide with the restraining orders. The Defendants content the orders they were served with were neither clear nor unambiguous, but that they at least tried to obey them by not continuing with the construction. They allege that they understood the maintenance of the *status quo* to mean they remain on the land. I am aware that a party who is served with an order has the duty to obey it, whether the order was illegal or void. In the case of **OCHINO & Another –Vs- OKOMBO & 4 OTHERS [1989] KLR 65** it was held that the court will only punish as contempt a breach of injunction if it is satisfied that the terms of the injunction are clear and unambiguous.

I have had anxious consideration of the facts that this application has presented, considering that the orders in question were made by a court of concurrent jurisdiction. I have come to the conclusion that the orders made on 31st August, 2007 and served on the Defendants were neither clear nor unambiguous, and that, in any case, the Plaintiff has failed to prove that the Defendants disobeyed them.

In conclusion, I dismiss the application with costs.

DATED AND DELIVERED AT NAIROBI

THIS 18TH MARCH 2010

A. O. MUCHELULE

J U D G E