REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT EMBU
CIVIL CASE NO. 34 OF 2009

DANIEL NDERI NJOGU…….....
……..……PLAINTIFF

VERSUS

LYDIA MUTHONI KIBAGE…...…….....
……...DEFENDANT

R U L I N G

The Applicant herein was granted leave to file his application for contempt of court against the respondent on 8.07.2010. He filed the application on 30.09.2010 seeking the following orders:-

1. That the court be pleased to order Lydia Muthoni Kabage the defendant in this case as well as her children Wairimu Kabage and Gachoki Kibage to be detained in prison for such a term not exceeding six months for their disobedience of the order of the court granted on the 12th May, 2010.

2. That in the alternative to prayer 2 hereof, and with respect to the defendant, the Honourable court be pleased to order the property of Lydia Muthoni Kibage, be it household, livestock, agricultural produce, bank account or however, be attached for disobedience of the order of the court granted on the 12th, may 2010, for such a time as the court may determine but not exceeding 12 months and the same be disposed of should the disobedience continue upon expiry of the period of attachment.

He also asks for costs of the application. The application is brought under OXXIX Rule 2A(2) of the Civil Procedure Rules.

The Application is premised on the 5 grounds on its face and supported by the affidavit of the Applicant dated 20.09.2010. The gist of the said grounds is that this court gave injunctive orders against the Defendant/Respondent on 12.05.2010 which orders restrained herself and her agents, servants etc. from trespassing onto or cultivating or in any way dealing with the plaintiff's portion of land Parcel No. **GARIAMA/NYANGENI /49** while pending the hearing of the application dated 19.01.2009 interpartes. Those orders were granted in the presence of counsel who had been sent to hold brief for Mr. Okwaro who was on record for the respondents.

The said order was extracted the same date and a penal notice was included as required by law. It was served on the defendant in person at her home on 18.05.2010. An affidavit of service was filed to that effect and the same is annexed to the Applicant's supporting affidavit as Annexure "DNN2".

According to the Applicant's Affidavit, he attempted to go into his portion of the suit land but the Respondent and her children jointly chased him away. This was repeated every other time when he tried

to go to his plot. He on one occasion took along a photographer who captured photographs of the Defendant/Respondent and her children armed with sticks and pangas chasing away the Applicant. These photographs are also annexed to the affidavit. It became clear to him that the Respondent and her children had no intention of complying with the court order and hence his filing of this application.

In her replying affidavit dated 10.11.2010, the Respondent does not actually deny service of the court order along with the penal notice on her. Although at paragraph 3 of the affidavit she denies disobeying the order, her stand as reflected in the contents of the affidavit is that that the land belonged to her late husband; that the Applicant has never lived there.

In paragraph 23 of her affidavit, she depones as follows;

"That I have never filed succession proceedings in respect of my husband's estate and I am therefore not the Administratix of the said estate."

That cannot nonetheless be true because in her affidavit dated 28.7.03 in support of an Application ,she swore as follows:-

3. "That through my advocates on record, I successfully applied to have the grant of letters of administration revoked/annulled.

4. That in his ruling dated 5.6.2000 revoking the Grant, the learned judge, Mr. Justice Githinji (as he then was) on his own motion proceeded to appoint me as the administrator of my deceased husband.

5. That the grant of letters of administration has not been confirmed as I could not have applied for such confirmation in view of this case…"

These 3 paragraphs of the said affidavit which forms part of the record in this matter clearly shows that the Defendant/Respondent is the administratix of her late husband's estate. They also clearly show that she is an unmitigated liar. The lies even go further as was pointed out by counsel for the respondent.

In her replying affidavit to this application, she swore at paragraphs 21 and 22 as hereunder:-

21. "That the plaintiff is attempting to enter upon and take possession of the suit land now as he has always attempted, so as to justify his claim to the said land parcel No. NGARIMA/NYANGENI/49.

22. That all the bushes and other developments on the said land belong to my late husband's estate and not to the Plaintiff".

Yet in her Amended defence and counterclaim dated 21.7.03 she at paragraph 5 stated that the deceased had allowed the Applicant herein to ***"use a small portion amounting to less than one quarter of the entire portion of land to plant tea".***

At paragraph 13 she states

"That the defendant contends that the Plaintiff is, without the consent of the defendant, unjustifiably and illegally in possession of approximately 4 acres of the suit land on which he had planted tea".

In her Affidavit dated 21.7.03 sworn in support of the application dated 21.7.03, she again depones at para 2 thereof:-

"That the Plaintiff currently occupies approximately 4 acres of the suit land on which he has planted tea. At the time of filing suit he was in occupation of about 3 acres of the land."

When she therefore swears in her present replying Affidavit that the Applicant has never lived on that land and that the tea bushes in question were planted by her late husband, she commits a serious act of perjury. My conclusion about her character after going through the mentioned pleadings and affidavits is that she is an unmitigated liar who has no respect for the truth or for court orders. I am indeed surprised and rather disappointed that her advocate repeated those falsehoods in court stating that ***"using that which he has never used".***

I must comment that her counsel was loudly silent on his client's earlier depositions to the effect that the defendant/Applicant herein was in possession of 4 acres of the land and had planted tea bushes. In this case, service of the order along with the penal notice is not denied or challenged in any way. Indeed, the Respondent has not even denied that she has failed to comply with the court order. She, through her counsel was even blatant enough to say that it will not be possible for her to comply with that order. Why? Because according to her, the Applicant has never been in occupation of the said land, and so the issue of her trespass does not therefore arise. This court has demonstrated above that that is not the position.

The only issue for this court to address therefore is whether the respondent has refused to comply with the said court order which was properly served on her. The position in law as explicitly set out in the **MAWANI VS MAWANI case (1977) KLR 159** is that:-

"It is the duty of every one in respect of whom a court order is made to obey such an order unless and until it is discharged, and disobedience of such an order results in the person disobeying it being in contempt and on an application to the court, by him not being entertained until he purges the contempt".

It was therefore incumbent upon the Respondent herein to ensure that the court order which was properly served on her was obeyed. Indeed, as I reminded counsel in court, a court order as long as the same is valid and not discharged must be obeyed. This principle is clearly set out in the *locus classica* of **HADKINSON VS HADKINSON (1952) AER 567.**

Where the court held – in paraphrase that:-

(i) Unless and until a court order is discharged, it ought to be obeyed;
(ii) That as long as the orders are not discharged, they are valid and they should be obeyed in observance and not in breach.

(iii) That the only way in which a reprieve from obeying a court order can be got before it is discharged is by applying that the same be stayed.

In this case, the contemnor has not even asked the court to discharge the said order. She has just intimated that she will not comply with it. In my considered view, her conduct of open defiance to the court orders, call for a firm decision from this court. Court orders must be respected. They must be obeyed as failure to do so brings the court into ridicule. The dignity and authority must be protected if the courts are going to continue to be haven where the oppressed and wronged can run for redress.

In this case, after considering all the material before me, and having made the above observations, I make the following findings:-

(1) That the Respondent was properly served with this courts order dated 12.05.2010.
(2) That the said order was clear and unambiguous and so was the penal notice.
(3) That the said order is a valid order of the court.
(4) That the said order MUST be obeyed unless and until discharged by the court.
(5) That it has been proved to a degree higher than that of a balance of probabilities that the Respondent has blatantly disobeyed the said order.
(6) That the Respondent is and continues to hold this court in contempt.
(7) That she is in contempt of court and she should be punished for it.

I therefore allow the application dated 30.09.2010 in terms of prayer 1 but with a variation that the Respondent **Lydia Muthoni Kabage** be arrested and be detained in prison for a period of **90 days** unless she shows cause why she should not be so committed.

W. KARANJA
JUDGE

Delivered, signed and dated at Embu this 8th day of December 2010
In presence of:- Mr. Okwaro for Respondent & Applicant in person.