



JOHN KIPKIRONG NGETICH.....PLAINTIFF

VERSUS

JAMES AGUI KIPROP NGETICH.....1ST DEFENDANT

PAUL NGETICH.....2ND DEFENDANT

BENJAMIN K. ROTICH.....3RD DEFENDANT

WILSON KIPCHUMBA ROB.....4TH DEFENDANT

DANIEL ROTICH5TH DEFENDANT

RULING

Before me is an application by way of a Chamber Summons brought by the Plaintiff under Order XXXIX Rule 2 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act filed in Court on 9th May, 2008 and amended on 16th December 2008 in which he seeks orders that the Defendants PAUL K. NGETICH, BENJAMIN K. ROTICH and WILLIAM ROB be committed to civil jail for a period not exceeding six (6) months for contempt.

In support of the application JOHN KIPKIRONG NGETICH has sworn an affidavit giving grounds in which he avers that on 7th December 2007 he instituted a suit against the three Defendants named above being ELDORET HCCC. No. 112 of 2007; that simultaneously with the Plaint he brought a Chamber Summons seeking a temporary injunction restraining the Defendants, their servants and or agents from selling, disposing off, constructing upon, destroying any property and/or otherwise further interfering with land parcel No. NANDI/CHEBARUS/81 pending the hearing and determination of this application inter partes; that the said order was granted on 4th December 2007; that the said order endorsed with a notice of penal consequences was served upon the Defendants and a return of service filed in Court; that on the 10th October 2007 at around 7.00 p.m. the Defendants/Respondents herein came to the suit land and cut off the barbed wire forming part of the suit property; that on the 17th December 2007 the 2nd Defendant/Respondent went ahead to carry out finishing of the latrine after felling trees to facilitate the activity; that on 1st January 2008 Paul Ngetich the 2nd Respondent and his son Thomas Bungei and others went ahead to fell more trees along the river; that the 2nd Respondent burnt down the entire fence surrounding the suit property; that on 22nd January, 2008 when he asked the 2nd Respondent why he was doing all those things, the 2nd Respondent attacked him occasioning him severe injuries and was treated at Moi Teaching and Referral Hospital; that he reported the matter to the police at Nandi Hills and was issued with a P3 Form; that the 1st and 2nd Respondents have burnt the pasture on the suit land and ploughed it in preparation for the next planting season; that on 14th January, 2008 the 1st Respondent threatened to kill him; that the disobedience was deliberate and calculated at undermining the authority and dignity of the Court; that the 1st and 2nd Respondents to date continue to construct and interfere with the suit land; that the Respondent's conduct should not therefore be allowed to go unpunished; and that he prays that this application be allowed and the persons names in the application be committed to civil jail

for contempt of Court.

The facts which gave rise to this litigation as gathered from the affidavit evidence on record and the pleadings briefly may be stated. One KIPCHUMBA ARAP KALU now deceased who was the father of both the Applicant and the Respondents died intestate and the suit land herein namely NANDI/CHEBARUS/81 formed part of his estate. A dispute arose in respect of the distribution of the estate more particularly the suit land among his sons named above which has attracted a prolonged litigation. In the year 2005 the 1st, 2nd and 3rd Respondents instituted proceedings before the Nandi Hills Land Disputes Tribunal claiming ownership of part of the suit land. The Tribunal after hearing the dispute by an award dated 9th August, 2005 directed that the suit land being the property of their deceased father and registered in his name ought to be shared equally between the Plaintiff/Applicant and the 1st, 2nd and 3rd Defendants/Respondents. The said decision of the Tribunal was filed in Court and was adopted as Judgment of the Court in KAPSABET PMCC (LDT) Cause No. 44 of 2005.

Pursuant to that decision of the Tribunal and its adoption by Kapsabet PMCC as the Judgment of the Court a decree issued and the process of subdivision following an order by the Court was initiated. The subject parcel of land was still registered in the names of KIPCHUMBA ARAP KALU the deceased father of the parties. The subdivision of the suit land was carried out by the Deputy District surveyor one Newton N. Njogu by the Order of the Court on 10th February, 2006 as follows:-

1. JOHN KIPKIRONG NGETICH 4.4.675 ACRES
2. JOHN NGETICH 0.1976 ACRES
3. JOSEPH NGETICH 4.5664 ACRES
4. JAMES NGETICH 4.5664 ACRES
5. PAUL NGETICH 4.5.664 ACRES

The applicant being dissatisfied with the decision of the Tribunal lodged an application by way of Judicial Review being ELD. HCCC. MISC. APPLICATION 248 OF 2005 challenging the decision of the Tribunal and the decree issued thereto but did not apply for stay of its adoption by the Court. The Court upon hearing the application for judicial review on 4th August, 2007 issued an order of Certiorari whereof it removed into the High Court and quashed the proceedings and award of the Nandi Hills Land Disputes Tribunal made on 9th August, 2005 respecting land parcel No. NANDI/CHEBARUS/81 together with the decree emanating from the said award pursuant to its adoption by the Kapsabet PM's Court vide Kapsabet PMCC (LDT) Case No. 44 of 2005.

The Applicant subsequently filed this suit being HCCC. No. 112 of 2007 in which he sought orders against the Defendants jointly and severally for:-

- (a) A declaration that the 1st, 2nd and 3rd Defendants are not entitled to enforce the decree issued by Kapsabet PM's Court PMCC (LDT) Case No. 44 of 2005 and the said Defendants cannot derive any benefit from the said decree and that any steps taken towards the enforcement of the said decree are illegal, null and void and of no legal effect.
- (b) A declaration that the purported sale of part of the land parcel No. NANDI/CHEBARUS/81 by the 1st, 2nd and 3rd Defendants to the 4th and 5th Defendants unlawful, illegal, null and void.
- (c) An eviction order to evict the Defendants from the suit land under the supervision and direction of the officer commanding the Nandi Hills Police Station.
- (d) A permanent injunction to issue to restrain the Defendants, their servants and or agents from trespassing into, selling, constructing upon, sub dividing, destroying property and or otherwise interfering

with land parcel No. NANDI/CHEBARUS/81 on the basis of the decree issued in Kapsabet PMC. LDT Cause No. 44 of 2005.

(e) Costs of the suit.

(f) Any other or further relief as the Court may be pleased to grant.

As I stated above, together with the Plaintiff the Plaintiff brought a Chamber Summons under Certificate of urgency which was granted in the following terms ex parte:-

“A temporary injunction be and is hereby issued restraining the Defendants, their servants and or agents from selling, disposing off, constructing upon, destroying any property and or otherwise further interfering with land parcel No. NANDI/CHEBARUS/81 pending the hearing and determination of this application inter partes.”

This was the order which was allegedly disobeyed and which sparked these contempt proceedings. The object of the interlocutory injunction is to protect the Plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were to be resolved in his favour at the trial.

The ex parte orders obtained by the Applicant on 4th December, 2007 were obtained wrongly because he did not disclose that land did not belong to him. The fact was that the suit land parcel No. NANDI/CHEBARUS/81 was registered in the name of KIPCHUMBA ARAP KALU the deceased father of both the Plaintiff/Applicant and the Defendants/Respondents who died intestate and the estate had not been distributed so that the land could transmit to the beneficiaries through succession. In that regard neither the Plaintiff/Applicant nor the Defendants have a superior proprietary or any right if at all over the suit land.

The Applicant also failed to disclose that the dispute over the suit land between him and his brothers, the Respondents had been deliberated over by the Nandi Hills Land Disputes Tribunal which decided that the contesting parties do share the suit land being parcel No. NAND/CHEBARUS/81 equally and this decision had been adopted by Kapsabet PM's Court as Judgment of the Court. Subsequently the Court ordered for the subdivision which was carried out and each party settled on his own portion.

It is trite law that a person who has attained possession in the first place and holding the indicia of legality, is to be protected in status quo and the law dictates that the one who seeks to change the status quo has only one of the two options:-

- (i) to gain possession through consent of the occupier; or
- (ii) to move to the Court to order the occupier to surrender possession to the Applicant.

Although purportedly the Applicant had applied to the Court for judicial review, at the time the order issued, the same had been overtaken by events because at the time the orders issued the decision of the Tribunal had been adopted by the Court and made Judgment of the Court and the only way the same could be challenged was to appeal to the High Court against that Judgment. But be it as it may either way the issue at hand being distribution of the estate of a deceased person transmission could only be secured through succession and not otherwise.

As I had said earlier, since each party had been settled in his respective portion of the suit land by the Order of the Court before this suit was filed and each party is occupying that same portion respectively including the Applicant, and until ownership is secured through transmission by petitioning the Court through Succession, it cant be said that the Respondents have disobeyed the Court Order.

In the result and for the reasons stated above, the Applicant's application for contempt of Court is dismissed with costs to the Respondents.

DATED AND DELIVERED AT ELDORET THIS 28TH DAY OF OCTOBER, 2009.

J. L. A. OSIEMO

JUDGE