



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT KITALE

Civil Case 147 of 2007

STEPHEN K. SUGUT.....PLAINTIFF

V E R S U S

KENYA COMMERCIAL BANK LTD.....1ST DEFENDANT

HILLROSE LIMITED.....2ND DEFENDANT

PHILIP MWAURA T/A GILLETE TRADERS...3RD DEFENDANT

R U L I N G

This is an application for the committal of the plaintiff to civil jail for breaching the orders which the court issued on 31/10/2007.

The applicant, who is the 2nd defendant, also prays for an order reinstating it to the suit land unconditionally.

Finally, the applicant asks the court to order the plaintiff to return all the applicant's household items and personal effects, which the plaintiff is said to have carried off from the suit land.

The application is supported with two affidavits sworn by Hillary Chemitei and Edwin Kipkosgei, respectively. Hillary Chemitei is described as a director of the 2nd defendant, whilst Edwin Kipkosgei is the 2nd defendant's farm manager.

It is the applicant's case that on 12/11/2007, the plaintiff, in the company of other unknown adult males trespassed onto the suit land, **NANDI/BARATON/591**. Whilst on the property, the plaintiff and the said men are said to have threatened the applicant's workers, telling them that they should vacate the property, failing which they would face serious consequences.

In the light of the said trespass and threats, the applicant's advocates wrote to the plaintiff's advocates on 12/11/2007, informing them of the same.

Notwithstanding the letter to the plaintiff's advocates, the plaintiff is said to have invaded the suit land on 14/11/2007. The plaintiff was said to have been accompanied with a group of more than 15 men.

Once the group was on the property, they chased away the applicant's workers. At the time of that invasion Edwin Kipkosgei was not at the farm, as he had gone to attend to a farmer who had called him to

perform artificial insemination services. However, when Edwin was on his way back to the farm, he met one of the applicant's employees who told him that the plaintiff, with over 15 men, had chased away the applicant's employees.

When Edwin arrived at the suit land, he says that he was accosted by the plaintiff and the men who were with him. He was hit with rungs and walking sticks, causing him to suffer serious injuries. However, he was lucky to escape, although he lost a lot of his property, including equipment used in his veterinary work, mobile phone, two DVD players, Television, Computer with printer and scanner, personal documents, gas cooker, personal clothing, beddings, mattresses and bed, and Kshs.95, 000/=.

After Edwin was treated at the Elgon View Hospital, Eldoret, he reported the incident at the Kapsabet Police Station. However, the police are said to have been reluctant to visit the suit land as they said that the issues arose in a Civil Case.

According to Hillary Chemitei, it is he who took Edwin Kipkosgei to the Elgon View Hospital. Thereafter, Hillary drove back to Kapsabet. But whilst on his way to Kapsabet he passed through the farm, where he noticed, from a distance, what was going on.

It is his evidence that he saw several people who were armed with bows and arrows and all manner of crude weapons. Some people were felling blue gum trees and spitting timber, and fencing-off the gate.

In the words of Hillary Chemitei;

“the plaintiff has regained possession of the suit property by force.”

And as the applicant believes that that action constituted a breach of the court orders dated 31/10/07, this court was invited to punish the plaintiff for having acted in a manner which lowers the dignity of the court.

The applicant pointed out that the plaintiff had moved the court with an application in which he sought an order prohibiting registration of any dealings in the suit land, and also an interlocutory injunction to restrain the applicant from entering onto or remaining on the suit land, or from wasting, damaging or alienating the said suit land until the case is heard and determined.

It is common ground that the plaintiff's application came up before the court on 31/10/07. As the parties needed to file further affidavits, the application was adjourned to 29/1/08, so that the parties could utilize the interim period to file and serve their further affidavits. In the meantime, the court ordered that there would be a prohibition of registration of any dealings with the suit property.

It is also common ground that on 31/10/07 the court did not grant any injunctive relief against the defendants. The injunctive reliefs that the plaintiff sought, but which are yet to be adjudicated upon by the court, included an order to stop the applicant herein from “***entering and/or remaining***” on the suit land.

According to the applicant, it had taken possession of the suit land in September 2007. It is for that reason that when the plaintiff threatened to force the applicant off the suit land, the advocates for the applicant wrote on 12/11/07, saying that should the plaintiff forcibly evict the applicant or cause injury to the applicant's workers, the plaintiff would be held liable.

Of course, it is meanwhile the plaintiff's position that the applicant was not in possession of the suit land, as at 8/10/2007 when this suit was instituted.

One of the grounds cited in the plaintiff's application for injunction was;

“ THAT the 2nd Defendant/Respondent is preparing to move his workers into the suit property an act that will damage and waste the same.”

In the light of those diametrically opposed positions taken by the two antagonists, this court is unable to make a finding, at this stage, as to whether or not the applicant had taken possession of the suit land on or about 17/9/2007, as it has asserted.

However, counsel for the plaintiff did concede that;

“the 2nd defendant moved onto the property long after being served with a summons to enter appearance. All the applicant’s actions were to establish itself on the suit property, so as to defeat the application dated 2/10/07.”

By virtue of that concession, it is clear that the applicant did take possession of the suit land, at some point in time.

The plaintiff’s complaint, as perceived from his submissions, was that the applicant did so after this case was filed, but without having obtained an order permitting him to do so. He also said that the court did not restrain him from entering the suit property.

Furthermore, the plaintiff believes that even if the court had restrained him from entering onto the suit land, the order so restraining him ought to have been served upon him. As no such order had been served upon him, the plaintiff believes that he cannot justifiably be condemned or penalized for disobedience.

To that end, the plaintiff placed reliance upon the decision by the Court of Appeal in the case of **MWANGI H.C. WANG’ONDU V NAIROBI CITY COMMISSION, CIVIL APPEAL NO.95 OF 1988.** In that case, the court emphasized that by virtue of the provisions of section 5 (10) of the Judicature Act, we in Kenya have to turn to the practice and procedure in England in order to discover how to exercise the power to punish for Contempt of Court. They said;

“ Briefly, the effect of these provisions is that as a general rule, no order of Court requiring a person to do or abstain from doing any act may be enforced unless a copy of the order has been served personally on the person required to do or abstain from doing the act in question. The copy of the order served must be indorsed 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. This requirement is important because the Court will only punish as a contempt 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 the breach of the injunction has been proved beyond reasonable doubt.”

In this case the plaintiff has conceded that the applicant is not currently in possession. He said;

“ reinstating him (the applicant) to the property would allow him to benefit from his own wrong doing, or enjoying a status quo which he has created.”

In my understanding of the plaintiff’s submissions, he is not denying having taken possession back from the applicant. But he feels that his action was justified because the applicant had taken possession without obtaining an order of the court permitting him to do so.

It is almost as if the plaintiff was saying that if the applicant could obtain possession of the property without a court order, so too could the plaintiff.

Of course, that begs the question as to why then the plaintiff should have taken the step of seeking court orders with a view to ensuring that the applicant did not access the suit land. Clearly, it is because without an order of the court, the plaintiff acknowledges that the actions constitute wrong doing. He cannot be heard to say that whereas the applicant’s actions should be deemed to be wrong doings, his similar actions should be righteous, in the eyes of the law.

Using the yardstick applied by the plaintiff in assessing the applicant’s actions, this court has no

hesitation in holding that the plaintiff is guilty of wrong doing, in obtaining possession of the suit land without obtaining an order of the court.

Should the plaintiff therefore be punished for contempt of court?

He says that he should not, because no order was served on him. But the applicant insists that this case should be distinguished from the regular cases, in which the parties usually cited for contempt would have disobeyed or disregarded or breached an order requiring them to do or to refrain from doing a specified thing. The applicant points out that herein, it is plaintiff who sought and was given orders. But, according to the applicant, the plaintiff thereafter acted in breach of the order he had obtained.

As far as the applicant was concerned, the plaintiff need not have been served with the order of the court, which he had extracted himself.

In principle, I believe that if a party sought and obtained an order from court, and thereafter extracted the formal order, which he served on the other party to the case, the party who had obtained the order cannot thereafter be permitted to argue that he could disobey the orders simply because the orders had not been served upon him.

The sole purpose for insisting that service be affected on the person before he could be cited for contempt is to ensure that he had personal knowledge of the order. Therefore, if a party applied for and obtained an order of the court, I cannot understand how he could thereafter feign ignorance of the same said order.

In this case, the plaintiff was granted an order prohibiting the registration of any dealing with the suit land. The intention was to safeguard the property pending further orders.

Pursuant to the decision in the case of **MWANGI H.C. WANG'ONDU VS NAIROBI CITY COMMISSION** (above-cited), the court will only punish for contempt if it satisfied that the terms of the injunction are clear and unambiguous, and that the breach of the order has been proved beyond reasonable doubt.

There is no doubt, to my mind, that the plaintiff has taken possession of the suit land subsequent to 31/10/07. However, the question is whether or not his said action constituted the breach of a clear and unambiguous order of this court.

First, as I have already held, the plaintiff's action constitutes a wrong doing, even in his own appreciation. He had asked the court for an order, but even consideration to the application, the plaintiff went ahead to reclaim possession of the suit land. That is certainly wrong. However, I do, reluctantly, hold that the action did not constitute the breach of any clear and unambiguous order of this court, as the plaintiff had not been restrained from entering onto the suit land.

But the plaintiff cannot be permitted, by law, to benefit from his own wrong doing. If that were allowed to happen, this court would have given the go-ahead to jungle law, wherein the mighty would have a field day, at the expense of the orderly justice system which is the cornerstone of law and order in society.

Although the plaintiff escapes punishment, by way of committal, he is nonetheless ordered to vacate the suit land forthwith, and to hand it over to the applicant, until further orders of this court.

In the interests of justice it is further ordered that whereas the applicant shall now have possession, the plaintiff is entitled to have a designated agent at the farm, for purposes of monitoring the work thereon, and in particular the harvesting of the tea.

The proceeds of the harvest and sale thereof are not to be released to any of the parties until further orders of this court. Meanwhile, the buyer of the tea leaves or any other produce from the suit land, is

required to maintain a detailed record of the purchases.

Each party shall have liberty to apply.

Finally, it is directed that even whilst these proceedings are ongoing, if the actions of any of the parties herein or their agents or servants constitute criminal activities, the police should take appropriate actions against the culprits. People must not be allowed to commit any crimes just because they could then hide behind the contention that their actions or omissions were undertaken in the course of ongoing civil cases. This order is made on the strength of the provisions of section 193A of the Criminal Procedure Code, which stipulates as follows;

“ Notwithstanding the provisions of any other written law, the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings shall not be a ground for any stay, prohibition or delay of the criminal proceedings.”

As the matters complained of by Edwin Kipkosgei appear to be of a criminal nature, the police are directed to carry out the requisite investigations, and to thereafter take appropriate action.

It is so ordered.

Dated and Delivered at Kitale, this 22nd day of January, 2008.

FRED A. OCHIENG

JUDGE