



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU

Civil Suit 339 of 2001

HARON MUGO KABUCHI.....1ST APPLICANT
HARON KINUTHIA MUYA.....2ND APPLICANT
MBUGUA KABUCHI.....3RD APPLICANT
PAULO KAMAU KOBU.....4TH APPLICANT
PATRICK MWAURA.....5TH APPLICANT
JOHN GATHURI KAMAU.....6TH APPLICANT
MARY WANGUI KAMAU.....7TH APPLICANT

VERSUS

NDIMO FARMERS CO-OPERATIVE SOCIETY.....1ST RESPONDENT
DAVID KARIUKI GITHIGA.....2ND RESPONDENT
JEREMIAH KINUTHIA MAHUGU.....3RD RESPONDENT
MICHAEL GATHURA KURIA.....4TH RESPONDENT
THOMAS WANDERI.....5TH RESPONDENT
SAMUEL WACHIRA KIMANI.....6TH RESPONDENT
WANJIRU DEREVA.....7TH RESPONDENT
MICHAEL GITAHI.....8TH RESPONDENT
DAVID KAMAU CHEGE.....9TH RESPONDENT

RULING

By a notice of motion made under **Order L Rule 1** and **Order XXXIX rule 2A (2) of the Civil Procedure Rules**, the applicants sought the orders of this court to have the 2nd – 9th defendants punished for allegedly being in contempt of the order of this court issued on the 10th of June 2002. The said application is supported by the annexed affidavit of the 1st applicant, Haron Mugo Kabuchi and the grounds stated on the face of the application. The application is opposed. The 3rd respondent Jeremiah Kinuthia Mahugu has sworn a replying affidavit opposing the said application for contempt. In the said replying affidavit the 3rd respondent has denied that the respondents have been in contempt of the said order of this court.

At the hearing of the application, Mr Karanja for the applicants submitted that it was not disputed that this court had issued an order restraining the respondents from interfering with the applicants' possession of the suit land pending the hearing and determination of the suit. He submitted that the respondents were served with the said order issued by this court. They were also served with a notice of penal consequences. He submitted that, in breach of the said orders, the respondents had interfered with the boundaries which had been fixed by the surveyor at the time the applicants filed the suit. He argued that it was clear that the respondents were in breach of the said order of this court and should therefore be cited and punished for contempt of court. He submitted that the respondents had made the allegation that the applicants had maliciously damaged property as a smoke screen to conceal the fact that they have been in contempt of the said order of this court. He urged this court to allow the application and punish the respondents for contempt of court.

Mr Owang', learned counsel for the respondents submitted that the respondents had not breached the order of this court which was issued on the 10th of June 2002. He submitted that the respondent had not interfered with the boundaries of the suit land. He argued that the respondents were contending that the subject parcels of land had not been surveyed and further that the applicants had without lawful authority fenced off part of the land belonging to the 8th and 9th respondents. He submitted that the applicants had taken advantage of the order issued by this court to extend the boundaries of their respective parcels of land. He argued that the applicants had used the said court order as a shield to enable them encroach on other members' parcel of land. He further submitted that there was no evidence that the respondents had encroached into the parcels of land which the said court order restrained them from encroaching into and interfering with. He submitted that the standard of proof in contempt of courts case were higher than the normal standard of proof in civil cases of proof on a balance of probability. He submitted that the applicants had not established that the respondents were in contempt to the required standard of proof. He argued that even if the respondents were to be found in contempt of the said order, this court should fine them instead of committing them to civil jail. Otherwise he submitted that the application for contempt should be dismissed.

Mr Karanja in response submitted that this court should not exercise leniency on the respondents because they were previously warned by this court on the 30th of May 2005 not to be in breach of the said order of this court. He submitted that the applicants had proved to the required standard that the respondents were in breach of the said order of the court.

I have considered the rival arguments made before me by learned counsel for the applicants and learned counsel for the respondents. I have also read the record of this court and the pleadings filed by the parties herein in respect of the application for contempt of court. From the outset, I would like to point out that this court has partly heard this case and taken the evidence of three of the applicants' witnesses. During the said hearing, it emerged that the respondents were interfering with the boundaries of the parcels of land comprised of the suit land which they had been specifically prohibited by this court. This court warned the respondents to desist from their action or else they would be cited for contempt of court.

Now it is apparent that the respondents did not heed the warning of this court hence this application. What is the order of this court that is the subject of this application? On the 10th of June 2002, Ondeyo J. issued an order of injunction restraining the respondents jointly and severally from interfering with the applicants possession and occupation of the suit parcels of land pending the hearing and determination of this suit. The respondents do not deny that the said order was issued. They further do not deny that the

said order together with the notice of penal consequences was served upon them. When they were served with this application for contempt, they denied that they had been in breach of the said court order. They further stated that no boundaries had been established by the surveyors to delineate the boundaries of the suit parcels of land. It was their argument that the applicants were using the said order of the court to encroach on the parcels of land belonging to other members.

I have carefully considered the facts of this case. It is clear that the respondents have creatively interpreted the said order of this court to avoid abiding by it. It is evident that the respondents are aware that the applicants were claiming specific portions of land which had been surveyed and title deeds issued. The respondents are challenging the issuance of the said titles and naturally they would not recognize the boundaries which were fixed by the surveyor which resulted in the applicants being issued with said title deeds. In order to scuttle the said order, the respondents have interfered with the boundaries of the suit parcels of land on the mistaken assumption that such no such boundaries existed. Having partly heard this case, it is clear that the issue of how the applicants obtained the title to the suit parcels of land cannot be divorced from their occupation of the suit land on the ground. This court issued an order restraining the respondents from interfering with the applicants possession of the suit parcels of land pending the hearing and determination of this suit. The said order is unambiguous. It ought to be obeyed.

If the respondents were of the view that the applicants were abusing the said order of this court by extending the boundaries of their said parcels of land, they ought to have made an appropriate application to this court for the variation of the said order. They are not at liberty to take the law into their own hands. The respondents have clearly disobeyed the said order by assuming that they would not be punished by this court. They are mistaken. They are in contempt of court and shall accordingly be punished. The acts of the respondents make a mockery of the said order issued by this court. The respondents cannot be allowed to interpret the order of this court with a view of disobeying it. I therefore find that the applicants have established their case for contempt of court against the respondents. This court finds the respondents to be in contempt of the order of this court issued on 10th of June 2002. The respondents are hereby ordered to appear before this court on the 27th of March 2006 at 9.00 a.m. to show cause why they should not be punished for contempt of the order of this court. The applicant shall have the costs of this application.

It is unfortunate that because of the respondents acts, the hearing of this case has been frustrated and has therefore stalled. It is the hope of this court that once the issue of contempt of court is dealt with, the parties to this suit shall endeavour to fix this case for hearing so that the same is heard and determined on merits.

DATED at NAKURU this 15th day of March, 2006.

L. KIMARU

JUDGE