



**Omollo v Nyaura (Sued as the legal administrator of Absalom
Ogutu Nyaura - Deceased) & 3 others (Environment & Land Case
348 of 2017) [2022] KEELC 15534 (KLR) (19 December 2022) (Ruling)**

Neutral citation: [2022] KEELC 15534 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MIGORI
ENVIRONMENT & LAND CASE 348 OF 2017
MN KULLOW, J
DECEMBER 19, 2022**

BETWEEN

FRANCIS NYAKWAKA OMOLLO PLAINTIFF

AND

**ZACHARIA OGUTU NYAURA (SUED AS THE LEGAL ADMINISTRATOR OF
ABSALOM OGUTU NYAURA - DECEASED) 1ST DEFENDANT**

MIGORI COUNTY 2ND DEFENDANT

MIGORI COUNTY 3RD DEFENDANT

HON. ATTORNEY GENERAL 4TH DEFENDANT

RULING

1. By Notice of Motion dated May 26, 2022, the Plaintiff/Applicant sought for the following orders: -
 - a. Spent.
 - b. The Honourable court be pleased to cite and punish the 1st Defendant/ Respondent, for disobeying and/or disregarding the lawful Court Decree issued and/or granted on the July 15, 2020.
 - c. Consequent to Prayer (2) hereinabove being granted, the Honourable Court be pleased to issue Warrants of Arrest, to bring the 1st Defendant/ Respondent before this Honourable Court for committal to jail for disobedience.
 - d. Consequent to prayer (3) hereinabove being granted, the Honourable Court be pleased to commit the 1st Defendant/ Respondent to jail for a duration not exceeding six (6) months and/or such shorter period as the court may deem fit and expedient.



- e. In the alternative, the Honourable Court be pleased to grant an Order of Sequestration to attach the properties of the 1st Defendant/ Respondent to attach the properties of the 1st Defendant/ Respondent, which properties be sold to defray the damages occasioned by the breach and/or disobedience of the lawful Court Decree made on the July 15, 2020.
 - f. Costs of this Application be borne by the 1st Defendant/ Respondent.
 - g. Such further and/or other orders be made as the court may deem fit and expedient.
2. The application is based on the 26 grounds thereof and on the Applicant's Supporting Affidavit sworn on May 26, 2022. The Applicant avers that judgment was entered in the matter on the July 15, 2020 in his favor and whose effect was to declare him the absolute owner/ proprietor of the subject land. In addition, a permanent injunction was issued against the Defendants restraining them from re-entering, trespassing into, cultivating and building structures on the subject land. The Decree was extracted and duly served upon the Defendants; with the orders being clear, explicit and unequivocal and contained the penal notice.
 3. It is his claim that sometimes on March 25, 2022; the 1st Defendant in clear disregard of the said orders and decree, commenced tilling, cultivating, trespassing and building permanent structures on the subject land.
 4. It is further his claim that the said actions by the 1st Defendant has interfered with his operations and occasioned him loss and damage and unless the orders sought are granted, he stands to suffer more damage. He contends that the actions of the 1st Defendant are aimed at defeating his rights over the suit property and the same amounts to willful and deliberate disobedience of lawful court orders despite being fully aware and knowledgeable of the said orders of July 15, 2020
 5. He further avers that as a result of the said disobedience and/or breach of the said court orders; it is impossible to enforce and execute the same and consequently urged the court to allow the Application in the interest of justice. He annexed a copy of the judgement dated July 15, 2020, the decree dated August 3, 2020 and bundle of photographs in support of his application.
 6. The application was opposed. The Respondents filed a Replying Affidavit sworn by the 1st Defendant and dated October 5, 2022 in response to the instant Application. It was his assertion that the Applicant is the registered owner of suit parcel No 381 while he is the registered owner of parcel No 1494; with the two parcels of land sharing a common boundary.
 7. It is his contention that the disputed portion between the two parcels is a portion measuring approx. 1.1Ha, that no actual measurements of the entire two parcels was done on the ground to ascertain the extent covered by the 2 parcels of land, in order to clearly ascertain whether his land had encroached the Applicant's parcel of land.
 8. It is further his claim that during the hearing of the case at the site; DW2, the County Surveyor showed the court the common boundary depicted by a fence made of sisal plants and found that there was no overlap of the boundary thereof.
 9. He thus maintained that he has not in any way trespassed into the Applicant's parcel of land or disobeyed the orders of the court and further urged the court to order for the resurvey thereof and file their report thereto. He dismissed the Application as being frivolous and without basis.
 10. The Application was disposed by way of written submissions. However, from a perusal of the court record, I note that only the Applicant filed his submissions. Be that as it may, I will proceed to render my ruling as hereunder;



11. I have read and considered the Application, the response thereto, the annexures thereto and the submissions of the Applicant and I have taken the same into account in arriving at my decision.

Analysis And Determination

12. The sole issue arising for determination herein is whether the Application dated May 26, 2022 is merited and the Defendants/ Respondents are in contempt of the court order issued on the July 15, 2020.

13. Contempt is defined in the Black's Law Dictionary as;

' Contempt is a disregard of, disobedience to, the rules, or orders of a legislative or judicial body, or an interruption of its proceedings by disorderly behavior or insolent language, in its presence or so near thereto as to disturb the proceedings or to impair the respect due to such a body.'

14. In *Econet Wireless Kenya Ltd vs Minister for Information & Communication of Kenya & Another*, Ibrahim J (as he then was) in addressing the issue on contempt made the following sentiments: -

' It is essential for the maintenance of the Rule of Law and order that the authority and the dignity of our Courts are upheld at all times. The Court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors. It is the plain and unqualified obligation of every person against or in respect of whom, 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 extends even to cases where the person affected by an order believes it to be irregular or void.'

15. The Applicant contends that the 1st Respondent has willfully and blatantly disregarded and disobeyed the orders of the court issued on the July 15, 2020 by trespassing, cultivating and building permanent structures on his portion of land contrary to the terms of the said orders. This is despite being fully aware and knowledgeable of the existence of the said order. The Respondent on the other hand maintained that he has never trespassed into the Applicant's portion of land and stated that he has remained on his side of the boundary between the two parcels which share a common boundary.

16. The elements to be proved in contempt proceedings were discussed in the South African case of *Kristen Carla Burchell vs Barry Grant Burchell* where it was held that in order to succeed in civil contempt proceedings, the applicant has to prove;

- i. The terms of the order,
 - ii. Knowledge of these terms by the Respondent,
 - iii. Failure by the Respondent to comply with the terms of the order.
- Upon proof of these requirements the presence of willfulness and bad faith on the part of the Respondent would normally be inferred.

17. The terms of the order and the knowledge of the said terms by the Respondent are not in dispute. What appears to be in dispute is whether there has been a willful and blatant failure and disobedience by the Respondent to comply with the said terms of the order. Both parties have taken rival positions



on the issue with the Applicant contending that there is trespass onto his portion of land and hence breach of the orders issued on the July 15, 2020 while the 1st Respondent has maintained that he is on his side of the boundary which is depicted by a live fence of sisal plants.

18. It is trite law that he who alleges must prove; the Applicant has annexed photographs of the land that has recently been tilled; he has not clearly demonstrated the extent of such trespass more so where the two parcels of land share a common boundary. The threshold of proving a claim of contempt of court is higher than the ordinary threshold in civil cases of balance of probabilities as was held in the case of *Gatharia K Mutitika vs Babarini Farm Limited [1985] KLR 227*. The burden rests with the Applicant to demonstrate such willful disobedience, it is not enough to merely state that there has been a breach of the orders issued by the court, especially where the liberty of the Respondent is at stake.
19. The Supreme Court of India in *Indian Airports Employees Union v Ranjan Catterjee & Another [AIR 1999 SC 880: 1999(2) SCC:537]* in addressing the issue of civil contempt held that: -

' In order to amount to 'civil contempt' disobedience must be willful. If disobedience is based on the interpretation of court's order, notification and other relevant documents, it does not amount to willful disobedience.'
20. Guided by the above decisions, it is my considered view that there was no willful and deliberate disobedience of the order issued on the July 15, 2020. It is not in dispute that the 2 parcels of land share a common boundary and the Respondent has maintained that his occupation, possession and use of his suit parcel of land No. 1494 is within his side of the sisal plant boundary. The Applicant on the other hand has not sufficiently proved to the required threshold the alleged trespass, re-entry and use of his parcel No 381 by the Respondent.
21. In view of the above, I find that the Applicant has failed to satisfactorily prove that there was indeed contempt of court orders to the required threshold to warrant the finding that the 1st Respondent is in contempt of the court orders issued on the July 15, 2020.

Conclusion

22. In the premises, I accordingly find that the Application dated May 26, 2022 is not merited and the same is hereby dismissed with no orders as to costs. Parties are however encouraged to respect the sisal boundary on the ground between the two parcels of land to avoid further litigation over the same subject matter. It is so ordered!

DATED, SIGNED and DELIVERED Electronically via Email on **19TH day of DECEMBER, 2022.**

MOHAMMED N. KULLOW

JUDGE

Ruling delivered in the presence of: -

Tom Maurice - Court Assistant

