



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII

CIVIL SUIT 16 OF 2003

PETER MOSE OGERO)

JAMES MAINYE OGERO) PLAINTIFFS

BENSON OGUTU OGERO)

VERSUS

STANLEY ONDORO BORAYA DEFENDANT

RULING:

On 25th march 2004 this court delivered a ruling finding the applicant/defendant to be in contempt of court. He was not in court on that day for sentencing. There after he brought this application seeking court to review its said ruling. He submitted that he has found new and important facts being that his land No. GESIMA/337 does not abuts that of the plaintiff and therefore he could not open the access road as directed by the court. It was submitted that if the court was aware of this then it would not have made the ruling. The application was opposed.

I have considered the application. I find it has no merit. There are no new facts which the applicant has discovered. First he states that there are other lands between his land and that of the plaintiffs. He did not attach any map to prove this. I concur with respondents that it would have been easy to get the index map and annex it to his affidavit to prove his claim. He did not do this.

Secondly the applicant told court that he subdivided his land Gesima Settlement Scheme/2 in 1996 which gave rise to Gesima/337, 338, 340, 343 and 344 all the way back in 1996. This is a fact which has been within his knowledge from that time. He knows well the position of each parcel of land. This fact is therefore not new to him and he cannot say that it could not be easily discovered. It was a fact within his knowledge and he cannot say that he has just discovered it.

The applicant was cited for contempt for disobeying an order entered into by court. This order is still in force. Even when the parties entered into the consent that the applicant allow passage over his land, the applicant knew that he had subdivided his land and he knew the position of each parcel of land. The court order was entered into on 6/2/03 and the subdivision was done in 1996 – about 7 years earlier. He never sought to enjoin the owners of those other parcels in the suit.

Counsel for the applicant submitted that if the Land Registrar went to the land he would confirm that the applicant's land do not abuts that of the respondents. This could well be so and again I believe parties were well alive to this when they entered into the consent order. The first limb of that consent order was that the District Land Registrar and Surveyor visit the disputed lands and determine whether there was a

road of access.

In the second limb they agreed that pending to such determination the applicant allow free passage. Court has been told that the two Government officials have yet to visit the land. Thus the determination is still pending. In fact the consent order was that pending the determination of the suit, applicant allow free passage. This was an order entered by consent and it is still in force. It is the order the applicant disobeyed and continues to disobey. His application therefore lacks any merit at all and is dismissed with costs.

Court will move to sentence him.

KABURU BAUNI

JUDGE

6/5/04

Signed and dated and delivered on 6/5/04 in presence of Mr. Masese and Omwamba and the applicant.

KABURU BAUNI

JUDGE

Court: Court to proceed for sentencing.

KABURU BAUNI

JUDGE

Contemnor in mitigation:

I have a sick wife in hospital who depends on me. I have a son admitted at memorial Hospital. He was operated on.

I also have a daughter who was supposed to proceed to University. She is suffering from ulcers.

I am 70 years old. I am weak. I am also councilor of Nyansiongo Town Council. I have never been in court before. I pray for leniency. If I am jailed my family will suffer.

Court: The court notes the mitigation. However court also notes that contemnor never purged the contempt. He is not even saying that he is going to.

SENTENCE:

Contemnor is fined shs.40,000/= (Fourth Thousand) in default 3 months imprisonment. He should purge the contempt forthwith.

KABURU BAUNI

JUDGE

6/5/04