



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC CASE NUMBER 23 OF 2017 (O.S)

JOANES ONDEGO OYWECH..... PLAINTIFF

VERSUS

ALEX OMONDI OGOLA.....DEFENDANT

RULING

Joanes Ondego Olweny (hereinafter) referred to as the applicant has come to court with summons to cite for contempt of a court order against Alex Omondi Ogolla (hereinafter referred to as Respondent) praying for an order of committal to civil jail against the respondent for a period that the court will deem fit.

The application is based on grounds that on 2/9/2020 the court issued interim orders that the respondent be restrained from interfering with the applicant's side of Kisumu/Kanyawegi/4646 pending hearing and determination of the application. The orders were extracted and served.

The respondent has pulled down the applicant's fence destroyed vegetation and is cultivating the applicant's side. The Respondent filed grounds of opposition that the application is vexatious, lacks merit and is abuse of court process.

Section 109 of the *Evidence Act* provides that:

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

The Supreme Court in *Republic -V- Ahmad Abolfathi Mohammed & Another* observed that –

“It is, therefore, evident that not only do contemnors demean the integrity and authority of Courts, but they also deride the rule of law. This must not be allowed to happen. We are also conscious of the standard of proof in contempt matters. The standard of proof in cases of contempt of Court is well established. In the case of Mutitika v. Baharini Farm Limited [1985] KLR 229, 234 the Court of Appeal held that:

“In our view, the standard of proof in contempt proceedings must be higher than proof on the balance of probabilities, almost but not exactly, beyond reasonable doubt...The standard of proof beyond reasonable doubt ought to be left where it belongs, to wit, in criminal cases. It is not safe to extend it to an offence which can be said to be quasi-criminal in nature.”

The rationale for this standard is that if cited for contempt, and the prayer sought is for committal to jail, the liberty of the contemnor will be affected. As such, the standard of proof is higher than the standard in civil cases. This power, to commit a person to jail, must be exercised with utmost care, and exercised only as a last resort. It is of utmost importance, therefore, for the respondents to establish that the alleged contemnor's conduct was deliberate, in the sense that he or she wilfully acted in a manner that flouted the Court Order.

This burden is known as the evidentiary burden of proof in legal parlance.

It was in applicant's burden to show some scintilla of evidence of those activities that are considered as contemptuous of the court order. I have considered the application, supporting affidavit and response by the respondent. The applicant has not exhibited any evidence of a destroyed fence, destroyed vegetation and or ploughing of the suit land. I do find that the application lacks substance and is dismissed with costs.

DATED AT KISUMU THIS 21st DAY OF JANUARY 2021

ANTONY OMBWAYO

JUDGE

This Judgment has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15th March 2019.

ANTONY OMBWAYO

JUDGE