



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL CASE NO. 155 OF 2002

MWENJA NGURE.....PLAINTIFF

VERSUS

SEROSAM INVESTMENT.....1ST DEFENDANT

COMMISSIONER OF LANDS.....2ND DEFENDANT

HON. THE ATTORNEY GENERAL.....3RD DEFENDANT

SAMMY SERONEY.....4TH DEFENDANT

RULING

On 14th October, 2003 this court issued some orders restraining the 1st and the 4th respondents from disposing of, alienating, transferring, wasting or in any other manner whatsoever interfering with the suit land or any part thereof. It was alleged that the 4th Defendant deliberately disobeyed the said order and on 27th October, 2003 the applicant through his advocates, Mirugi Kariuki & Company filed an application by way of a Notice of Motion under Section 5 of the Judicature Act and Order XXXIX Rule 2(3) of the Civil Procedure Rules seeking orders that the 4th respondent be found to have disobeyed the said court order and that his properties be attached and further that he be detained in prison for a term not exceeding six months. The court was also urged to deny the 4th respondent audience until he purged the contempt. The application was supported by an affidavit sworn by the applicant on 27th October, 2004 and the 4th respondent filed his replying affidavit on 28th October, 2004.

The application was heard from 20/5/2004 and viva voce evidence was taken. The applicant stated that the 4th Defendant was the proprietor of the first respondent firm. He testified that the 4th respondent was served with the court order issued on 14th October, 2003. He stated that before the said order was served, the 4th respondent had not put any beacons on the suit land. The suit land was not defined in the court order of 14th October, 2003 neither was it stated in the application dated 27th October, 2003.

However, in the plaint, the applicant had stated that he was the lawful allottee of Government Land known as L.R. GL 452/1/4 and had been in occupation thereof since 1968. He also stated that on or about December, 2001 and January 2002 the 1st respondent unlawfully moved its surveyors on parcel of Land L.R. 13123 and subdivided it. In his testimony before the court, the applicant stated that before the court order was served upon the 4th respondent, he did not put any beacons on the land but after service of the order, he took some people to the suit land who erected beacons thereon. He testified that he saw the 4th respondent ferrying some people there using his motor vehicle. He said that those people destroyed his maize crop as they erected the beacons.

He further testified that he called a photographer who photographed the beacons and he produced the photographs in court as exhibits.

In cross examination, he stated that his plots were Nos. 13122 and 13123 and that he was staying on Plot No. 13123 where he was building but did not have a title deed for it. He admitted that the court order that was served upon the 4th respondent did not refer to any plot number but he stated that he did not know that Plot No. 13123 was registered in the name of the 4th respondent. He was also not aware that Plot No. 13123 had been subdivided into 5 portions and that some of the portions thereof had been sold to Unicab Housing Co-operative Society Ltd.

The 4th respondent testified that he was served with the said court order on 15/10/2003. The relevant part of the order stated as follows:-

“It is HEREBY ORDERED, 1. That this application be and is hereby certified as urgent.

2. That pending inter partes hearing of the said application the 1st and 4 th defendants are restrained by themselves and/or their servants by way of a temporary injunction from disposing of, alienating, transferring, wasting or in any other manner howsoever interfering with the suit land herein or any pa rt thereof.

3. That this application be heard inter partes on 22 nd October, 2003.”

The 4th respondent stated that he had a certificate of title for L.R. No. 13123 which was dated 26/6/2002. It was in the name of **NGONY INVESTMENT SERVICES** which he sub-divided into 5 portions in 2002 and sold and transferred one of those sub-divisions to Unicab Housing Cooperative Society Ltd. The transfer was effected on 2/9/2003.

The 4th respondent testified that the court order which was served upon him restrained him from dealing with the suit land which was undefined but that notwithstanding he never did anything on his parcels of land thereafter and he denied ever taking people to the land. He was however aware that Unicab Housing Co-operative Society Ltd had engaged a surveyor to subdivide and put beacons on their land.

I have carefully considered the application before me and all the documents filed herein. The court order that was issued did not specify what parcel of land it referred to. It merely talked of **“suit land”** . The evidence which was tendered in court by both the applicant and the respondent showed that the alleged contemnor was at the time of the issuance of the order the registered proprietor of L.R. No. 13123. There is evidence that he sub-divided that parcel of land and had sold some portions thereof way back in the year 2002.

There is also evidence to indicate that other people apart from the 4th defendants were erecting beacons on some parcels of land which are adjacent to the Plaintiff/Applicant’s parcel of land but not on his parcel of land.

In **MUTITIKA VS BAHARINI FARM LTD [1985] K.L.R. 227** the Court of Appeal held that the guilt of a contemnor must be proved strictly as is consistent with the gravity of the charge.

However, in this particular matter, we are not even dealing with the degree of proof, in my view it is whether there was any contempt or not.

I am of the considered view that the applicant did not prove any contempt of a court order against the respondent. I therefore dismiss with costs the application dated 27th June, 2003.

DATED at Nakuru this 30th day of September, 2004.

DANIEL MUSINGA

AG. JUDGE

30/9/2004