



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUSIA

CIVIL CASE NO. 191 OF 2017

OKELLO WANDERA KUBIRI.....1ST PLAINTIFF

RODA MAKOKHA MASINDE.....2ND PLAINTIFF

= VERSUS =

JONATHAN JUMA.....1ST DEFENDANT

ELIZABETH JUMA..... 2ND DEFENDANT

MADILU JUMA..... 3RD DEFENDANT

RULING

1. For determination is the plaintiffs' application dated 12/3/2020 brought under the provisions of order 40 rule 3. The Applicants prays for orders;

(a) That an arrest warrant be issued on the Respondents. The respondents be arrested and committed to civil jail for a period of six months or should pay a fine for defying the Court Order issued on the 17th April, 2018 by entering and continuing to cultivate on the suit land.

(b) That costs of the application be provided for.

2. The application is supported by the facts deposed in the affidavit of the 1st applicant Okello Wandera. Mr. Wandera deposed that he is the registered owner of L.R No. Bukhayo/Buyofu/2017 while the 2nd applicant is registered as owner of Bukhayo/Buyofu/141. That on 17th April 2018 they obtained an order of temporary injunction restraining the defendants and their families from dealing on the two land parcels pending determination of this suit. He deposed that the said order was served upon the Respondents on 20/4/2018. The 1st Applicant continued that the Respondents have ignored the said court order and went on to enter and develop and cultivate the two suit parcels. That they wrote to the Respondents' advocate drawing their attention to the defiance of the order. They contend further that the chief also drew attention of the Respondents regarding the breach of the order in his letter dated 11th September 2018 but the Respondents have ignored and or refused to stop the breach.

3. The dependants opposed the application through the replying affidavit of Jonathan Juma on behalf of the 2nd and 3rd defendants. He deposed that all the Respondents live and farm their ancestral land parcel No. Bukhayo/Buyofu/139. That they stopped farming on the lower part of their parcel No. Bukhayo/Buyofu/139 after they learnt of the case which is pending to determine whether or not there has been trespass as alleged by the plaintiffs. The Respondents aver that there is no report from the County

Land Registrar to ascertain the alleged trespass. They denied being served with the impugned order. They also denied committing any act of contempt. The 1st Respondent deposed that L.R No. Bukhayo/Buyofu/139 is situated between parcel Nos. 141 and No. 2017 and the boundaries separating the two parcels are not straight as shown in an extract of a map annexed to their affidavit.

4. The Applicants are asking the court to commit the Respondents to civil jail for disobedience of a court order. Contempt proceedings have been classified as quasi-criminal therefore standard of proof is placed above the standard required for Civil law cases. In *Mutitika Vs Baharini Farm Ltd (1985) KLR 229, 234* the Court of Appeal expressed itself thus; **“the standard of proof in contempt proceedings must be higher than proof on the balance of probabilities, almost but not exactly, beyond reasonable doubt. We envisage no difficulty in courts determining the suggested standard of proof. 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 offence which can be said to be quasi – criminal in nature”**.

5. The burden of proving the contempt rests on the Applicants as the persons making the allegations. It is not in dispute that this court issued an order of temporary injunction against the Respondents on 9/4/2018. The Respondents have denied being served with the impugned order. They also denied that they are in disobedience.

6. Were the defendants/Respondents made aware of the Order? From the proceedings of 9/4/2018, the order was made in the absence of the Respondents as well as the absence of their advocate. The Applicants' annexure OWK-2 is the affidavit of service confirming service of the order upon the Respondents. Although the Respondents denied service, they said nothing on the description of where, how and when they were served by the process server. I am therefore satisfied that the order was served on them.

7. The next issue is whether or not the Applicants have proved disobedience of the impugned order. The Respondents deposed that they are using and farming their ancestral land No. Bukhayo/Buyofu/139 which lies between parcel No. Bukhayo/Buyofu/141 and 2017. That they stopped using the lower part of the land upon learning of the existence of this suit. There is annexed an extract of the area map to the replying affidavit which confirms that indeed parcel No. Bukhayo/Buyofu/139 lies between L.R No. 2017 and L.R No. 141. The order required the Respondents to refrain from, **“entering, developing, building, cultivating or otherwise dealing in any way with L.R Nos Bukhayo/Buyofu/2017 and 141.”**

8. In the Case of *Alkens Connections Ltd Vs Safaricom Ltd & 2 others (2013) eKLR*, it was stated that where committal for contempt was sought for breach of an injunction, it must be made clear what each of the defendants is alleged to have done and whether it was in breach of an injunctive order. In their attempt to demonstrate the breach, the Applicants relied on two letters. The first letter is drawn by the Applicants' advocate on record dated 30/5/2018 and addressed to the Respondents' Counsel. The relevant portion read thus; **“the 1st defendant has totally refused to obey the said Court Order and is going on with trespassing into the above mentioned parcels of land by entering and cultivating in them. He has even gone ahead to insult the plaintiffs whenever he meets them or when they tell him to stop trespassing.”**

9. The second letter was drawn by the area Chief dated 11th September 2018 and addressed to the Deputy Registrar of this court. At paragraph 2 and 3 the said letter states thus;

“I hereby notify you of the continued violation and blatant ignoring of the above mentioned court order and the contents therein by the defendants and their family members. I have visited the lands in question and found that the defendants and their family members have continued to undertake their agricultural activities by cultivating the said disputed portions without respecting the court order. This has continued to cause tension and breach of peaceful co-existence between the plaintiffs and the defendants families. Kindly intervene and enhance the enforcement of the court order dated 17th April 2018 until the suit is determined.”

10. The Chief's letter did not specify which of the defendants were going on with cultivation and on

which parcel of land between the two parcels. The counsel's letter dated 30th May 2018 made reference to 1st defendant but failed to specify the cultivation was being undertaken on which parcel of land. The Respondents in denying they are guilty of disobedience pleaded that they are cultivating their ancestral land title No. Bukhayo/Buyofu/139. The land separating the two suit parcels (i.e No. 139) is not claimed by any of the Applicants. Each of the Applicants hold separate title deeds i.e. 1st Applicant holds title to No. 2017 while the 2nd Applicant holds title to No. 141 hence the burden of proof required each Applicant to particularise acts constituting the breach and who committed the acts complained of.

11. In my opinion making general accusations against the 3 defendants to apply to the 2 parcels of land do not constitute sufficient proof required in contempt proceedings envisaged in law. Consequently, it is my finding that the disobedience complained of has not been proved to warrant this court to grant the order of arrest of the Respondents and or their committal to civil jail. Accordingly, the motion dated 12/3/2020 be and is hereby dismissed with costs to the Respondents.

Dated and signed at BUSIA this 25th day of February, 2021.

A. OMOLLO

JUDGE