



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT BUSIA**

**CASE NO. 16 OF 2019**

**VENSWA ODUNGA OKUMU..... APPLICANT**

**= VERSUS =**

**NICHOLAS EGESA MAYIA.....RESPONDENT**

**R U L I N G**

1. The plaintiff/applicant has moved the court vide his application dated 22<sup>nd</sup> September 2020 and brought under the provisions of Order 40 rule 3 plus other enabling legislation. The Applicant prays for orders;

**1) Spent.**

**2) That the Respondent herein NICHOLAS EGESA MAYIA be cited for contempt of court for refusing to obey this Honourable court's order of injunction dated 12/5/2020 stopping him, his agents, workers, family members or persons working under him from invading, trespassing, transferring, ploughing, tilling or destroying the applicant's crops and trees and or in any manner interfering with the applicant's occupation of L.R No. BUKHAYO/MUNDIKA/10621 pending the hearing and final determination of this suit.**

**3) That should this court cite him for such contempt, he be committed to Civil jail for a period of 6 months and/or fined Kshs.100,000 and/or any other such suitable punishment this court may impose towards disobedience of such court order.**

**4) That the respondent be denied audience until and/or unless he purges the contempt and/or deposits in court the sum of Kshs.100,000 as costs for loss of user.**

**5) That the costs of this application be borne by the respondent.**

2. The application is supported by the grounds listed on its face and the affidavit sworn in support thereof. The Applicant pleaded that the orders of temporary injunction issued by this court on 12<sup>th</sup> May 2020 was duly served on the respondent. However, in spite of service and knowledge of the order, the respondent has defied the same and continued to put the suit parcel into his own personal use by entering onto the applicant's land and harvesting maize and has even gone ahead to prepare the same for planting. The applicant urged the court to punish the respondent for being in contempt of its orders.

3. The respondent opposed the application via his replying affidavit sworn on 15<sup>th</sup> October 2020. He denied hiring a tractor to plough the suit land specifically on 22<sup>nd</sup> August 2020. The respondent deposed that he lives near the said land and it is fallow and unploughed. He denied disobeying the order given on 29/4/2020 and issued on 12/5/2020.

4. The advocates on record opted to argue the application by filing of written submissions. However, none was filed. Contempt proceedings are quasi-criminal and any party wanting the court to punish for contempt is required to prove the disobedience on a strict liability. The applicant deposes that the respondent ploughed the suit land in contravention of the court order. The respondent having denied the allegation, the applicant was under a duty to demonstrate that the suit land was ploughed and that the same was done by the respondent.

5. In the grounds listed in support of the application as well as the supporting affidavit, the applicant did not give details of when the land was ploughed or the maize harvested. It is a rule of evidence under section 109 of the Evidence Act Cap 80 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"**.

6. The applicant herein has stated a fact with nothing to prove whether or not the respondent acted by himself or through an agent. It is also not distinguished the change of status of the land prior to the order i.e. whether it was ploughed or unploughed. The respondent pleaded in his replying affidavit that the land is in an unploughed state. Further, there are no particulars of interference explained which the Respondent is

guilty of post the order alleged to have been disobeyed. The applicant was given leave to file a further affidavit but he did not. Thus the facts pleaded to constitute contempt have not been proved within the required standards.

7. In **Katsuri Limited Vs Kapurchand Depar Shah [2016] eKLR** the Court of Appeal held;

**In *Peter K. Yego & Others vs Pauline Nekesa Kode* the court recognizing that contempt of court is criminal, held that it must be proved that one has actually is obeyed the court order before one is cited for contempt. The applicant in an application for contempt must prove beyond peradventure that the respondent is guilty of contempt...**

**Although the proceedings are civil in nature, it is well established that an applicant must prove the elements beyond reasonable doubt, at least higher than the standard in civil cases. The fact that the liberty of the defendant could be affected means that the standard of proof is higher than the standard in civil cases. It is incumbent on the applicant to prove that the defendant's conduct was deliberate in the sense that he or she deliberately or willfully acted in a manner that breached the order. (underline mine for emphasis).**

8. In the instant case, it is my finding that the application has not been proved and is without merit. It is dismissed with costs to the respondent.

**Dated and signed at BUSIA this 1<sup>st</sup> day of February, 2021.**

**A. OMOLLO**

**JUDGE**