



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYAHURURU

E.L.C. NO. 19 OF 2018

RUTH WANJERI KAMWERE (Suing as Administrator of the Estate of John

Kamwere Gichuhi – Deceased).....**1ST PLAINTIFF**

GEORGE KIMANI & DAVID KANOGA KAGUMA (Suing as Administrators

of the Estate of Eliud Kaguma – Deceased).....**2ND PLAINTIFF**

VERSUS

VINCENT NYINGI NDERITU.....**DEFENDANT**

RULING

A. THE DEFENDANT'S APPLICATION

1. By a notice of motion under certificate of urgency dated 21st September, 2020 expressed to be brought under **Section 63(c), 1A, 1B, and 3A of the Civil Procedure Act (Cap.21), Order 40 Rule 3 of the Civil Procedure Rules and all enabling provisions of the law**, the Defendant sought the following orders:

a. Spent.

b. That pending hearing and determination of this application, the OCS Njabini Police Station and OCPD Kinangop Division be ordered to personally appear before court and show cause why they have declined to enforce the orders of court issued by Honourable Lady Justice M.C. Oundo on 9th July, 2019 with regard to land parcel No. Nyandarua/Njabini/615 as against the Defendants and their servants who have perpetually been cutting trees and carrying them in huge lorries for sale in broad daylight.

c. The Plaintiffs/Respondents Ruth Wanjeri Kamwere, George Kimani and David Kanoga Kaguma be committed to prison for a maximum period of six (6) months for contempt of the status quo orders issued by Honourable Lady Justice M.C. Oundo on 9th July, 2019 ordering parties herein to maintain status quo with regard to land parcel No. Nyandarua/Njabini/615.

d. That this Honourable Court be pleased to issue a further hearing date for the main suit to fast track the hearing and conclusion of this matter.

e. That the costs of this application be borne by the Plaintiffs/Respondents.

2. The said application was based upon the grounds set out on the face of the motion. It was contended that the Plaintiffs had disobeyed the *status quo* orders granted on 9th July, 2019 and that the OCS Njabini Police Station and OCPD Kinangop Division had declined to enforce observance of the order. The Defendant contended that the Plaintiffs, their sons, relatives and agents had entered his parcel of land (Parcel 615) and cut down trees for sale which they ferried away in lorries.

3. The Defendant contended that even after police officers from Njabini Police Station arrested some lorry drivers ferrying logs from Parcel 615 they did not charge them with any criminal offence but they instead released them and confiscated the logs. It was further contended that there was collusion between the Plaintiffs and the security officers at Njabini Police Station to log trees in Parcel 615.

B. THE PLAINTIFFS' RESPONSE

4. The Plaintiffs filed a replying affidavit sworn by David Kanoga Kaguma on 3rd January, 2021 in opposition to the said application. The Plaintiffs confirmed that they were aware of the *status quo* order and denied having violated it in any manner. In particular, they denied having cut down any trees on Parcel 615 as alleged by the Defendant. They further denied any collusion with the OCS of Njabini Police Station and the OCPD of Kinangop Division.

5. The Plaintiffs denied any association with the drivers who were allegedly arrested and put the Defendants to strict proof thereof of any association with them. It was denied that they had given any instructions to the said drivers. The Plaintiffs considered the instant application as an attempt by the Defendant to intimidate them hence they urged the court to dismiss it with costs.

C. THE DEFENDANT'S FURTHER AFFIDAVIT

6. The Plaintiff filed a further affidavit sworn on 5th March, 2021 in response to the Plaintiffs' replying affidavit. He reiterated the contents of his supporting affidavit and maintained that the Plaintiffs had violated the *status quo* order. He attached copies of leaflets indicating that some reports had been made to a police station and a police post on diverse dates between November 2018 and July 2019. However, the details of what was reported were not exhibited.

7. The Defendant insisted that the law enforcement agencies at Njabini and Kinangop Division had been compromised hence the reason they were unwilling to enforce the *status quo* order.

D. DIRECTIONS ON SUBMISSIONS

8. The material on record shows that the said application was to be canvassed through written submissions. The Defendant filed his written submissions on 8th March, 2021, but the Plaintiffs' submissions were not on record by the time of preparation of the ruling.

E. THE ISSUES FOR DETERMINATION

9. The court has considered the Defendant's notice of motion dated 21st September, 2020 together with the supporting affidavit and annexures thereto, the Plaintiffs' replying affidavit in opposition thereto as well as the Defendant's further affidavit. The court has also considered the material on record. The court is of the opinion that the following issues arise for determination herein:

- a. Whether the Defendant has proved the contempt alleged against the Plaintiffs.
- b. Whether the OCS Njabini Police Station and OCPD Kinangop Division should be directed to supervise enforcement of the *status quo* order made on 9th July, 2019.
- c. Whether the suit should be set down for hearing or further hearing on priority basis.
- d. Who shall bear costs of the application.

F. ANALYSIS AND DETERMINATION

a. Whether the Defendant has proved the contempt alleged against the Plaintiffs

10. The court has considered the material and submissions on record on this issue. Whereas the Defendant maintained that the Plaintiffs, their sons, relatives and agents were involved in felling trees on Parcel 615, the Plaintiffs denied any involvement in the alleged acts and put the Defendant to strict proof thereof. The Plaintiffs denied any association with the lorry drivers who were allegedly arrested by police officers from Njabini Police Station transporting logs.

11. Although the Defendant claimed that the Plaintiffs, their sons and relatives had colluded with police officers to log trees in Parcel 615 for sale in violation of the court order made on 9th July, 2019 the Defendant does not appear to be sure who was really responsible for the logging. The court does not find any credible evidence on record linking the Plaintiffs, their sons, relatives or police officers to the logging.

12. The contents of paragraph 9 of the Defendant's supporting affidavit easily give away the Defendant's uncertainties. In the said paragraph, the Defendant deposed as follows:

“That even after arresting some drivers carrying logs from the disputed parcel of land and detaining their lorries, the police never informed me who authorized the owners of the lorries to cut and carry away trees from the disputed parcel of land.....” (underlining added).

13. It is, therefore, abundantly clear that the Defendant himself was unsure of who had authorized those drivers to carry away the logs. The registration mark and numbers of the lorries were not disclosed in the application. There is no evidence on record that the lorries belonged to the Plaintiff, their sons or their relatives. The identity of the drivers was not disclosed and there is no evidence to demonstrate that those drivers were acting at the behest or instructions of the Plaintiffs or any one of them.

14. It has been held that contempt of court is a serious charge and that it ought to be proved to the satisfaction of the court. The standard of proof was considered in the case of **Mutitika v Baharini Farm Ltd [1985]eKLR** where it was held, *inter alia*, that:

“We agree with Mr. Khaminwa’s submissions in this respect. 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. We envisage the 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 offences which can be said to be *quasi-criminal* in nature....”

15. The court is thus far from satisfied that the contempt alleged against the Plaintiffs has been proved to the required standard for reasons already given hereinbefore. The allegations of contempt were merely based on speculation that the Plaintiffs were the likely suspects. Even the copies of leaflets annexed to the Defendant’s further affidavit do not indicate that the Plaintiffs were involved in the logging. Consequently, the court finds and holds that the Defendant has failed to prove the contempt of court charges against the Plaintiffs to the standard required by law.

b. Whether the OCS Njabini Police Station and OCPD Kinangop Division should be ordered to supervise enforcement of the *status quo* order

16. The court has considered the material on record on this issue. The court has also taken into account the nature of the order which was made on 9th July, 2020. There was no positive order capable of enforcement in the customary manner but merely an order for maintenance of *status quo* to ensure that “*nothing shall be committed on the suit land that results in any destruction, disposition, or wanton waste of the same*”.

17. What actions may result into “disposition” or “wanton waste” are quite wide and varied. They are not actions which may necessarily be obvious to a police officer in the ordinary course of his duty. Even if the OCS and OCPD were to deploy police officers on Parcel 615 it may still not be practicable to expect them to know the full range of acts and omissions which they shall be expected to guard against in order to prevent destruction, disposition, or waste of Parcel 615. The court is thus of the opinion the *status quo* order as framed does not leave itself to supervision or enforcement by the OCS or OCPD as sought in the application.

c. Whether the suit should be set down for hearing on priority basis

18. The material on record shows that the suit has been pending for more than 10 years and that it is part-heard before Justice M.C. Oundo. The court is in full agreement with the Defendant that the suit ought to proceed for further hearing or hearing *denovo* on priority basis. In fact, the Defendant ought to have listed the suit for directions on the hearing of the suit instead of filing the interlocutory application for contempt of court. Accordingly, the court is inclined to grant this order.

d. Who shall bear costs of the application

19. Although costs of an action or proceeding are at the discretion of the court the general rule is that costs shall follow the event in accordance with the proviso to **section 27 of the Civil Procedure Act (Cap 21)**. A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See **Hussein Janmohamed & Sons Vs Twentsche Overseas Trading Co. Ltd [1967] EA 287**. Since the Defendant has only succeeded in part and the hearing of the suit is yet to be concluded, the court is of the opinion that costs of the application should be in the cause.

G. CONCLUSION AND DISPOSAL

20. The upshot of the foregoing is that the Defendant’s application succeeds only in part. Consequently, the court makes the following orders for disposal of the notice of motion dated 21st September, 2020:

- a. This part heard suit is hereby certified fit for hearing on priority basis as sought in order No. 5 thereof.**
- b. The rest of the prayers sought in the said application are hereby declined.**
- c. Costs of the application shall be in the case.**
- d. The Deputy Registrar shall cause that the proceedings to be typed within 30 days.**
- e. The suit shall be mentioned on 7th June, 2021 for directions on the hearing or further hearing of the suit.**

It is so decided.

RULING DATED AND SIGNED AT NYAHURURU AND DELIVERED VIA MICROSOFT TEAMS PLATFORM THIS 18TH OF MARCH, 2021

In the presence of:

Mr. Ng’ang’a for the Plaintiffs

Mr. Musungu for the Defendant

Court Assistant - Carol

Y.M. ANGIMA

JUDGE

18.03.2021