



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**

**AT KISUMU**

**LAND CASE NO. 86 OF 2016(OS)**

**DUNCAN OMONDI CALEB.....1<sup>ST</sup> PLAINTIFF/APPLICANT**

**MARY ATIENO AYALO.....2<sup>ND</sup> PLAINTIFF/APPLICANT**

**-VERSUS-**

**SHEM ONYANGO OCHIENG.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**AGGREY ALUDA EDEGE.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**RULING**

The plaintiffs/applicants have filed an application (under certificate of urgency) dated 24/07/20 and filed on the same day. The application is premised on the provisions of Order 40 Rule 3 of the Civil Procedure Rules, Section 1A, 1B and 3A of the Civil Procedure Act. The application seeks the following orders that Shem Onyango Ochieng be held in contempt of Court for willful disobedience of the Court order made on 9<sup>th</sup> June 2016. That upon being held in contempt, the said person be jailed for a period of 6 months for disobeying Court Orders or for such other period as this Court may deem just and appropriate. FURTHER OR IN THE ALTERNATIVE to prayer 2, the 1<sup>st</sup> Respondent be condemned to pay to the applicants Kshs. 325,352.20/- being the value of the loss occasioned to the plaintiffs by the 1<sup>st</sup> Defendant's act of contempt. That the 1<sup>st</sup> Defendant be ordered to bear the costs of this application.

The application is supported by the 1<sup>st</sup> Plaintiff's supporting affidavit sworn on 23/07/20. The following grounds of the application can be deduced from the face of the application and the supporting affidavit;

- a) The applicants herein filed this suit together with an application dated 18/04/2016 seeking inter alia an order for a temporary injunction restraining the 1<sup>st</sup> Defendant from entering into, taking possession, evicting the Plaintiff, alienating or in any other manner interfering with the Plaintiff's quiet enjoyment occupation, use or enjoyment of Land Parcel No. KISUMU/KASULE/6584 (hereinafter 'the suit property')
- b) That on 09/06/16, by consent of both parties, the Court ordered that the status quo of the suit property be maintained; which Court order has not been set aside, appealed against or varied in any way.
- c) The 1<sup>st</sup> defendant moved to the suit property on 09/07/20 and cut down 37 trees belonging to the plaintiffs in total disregard of the Court orders issued on 09/06/16 upon which the applicant

reported to Kasagam Police station vide OB NO. 11/9/07/2020.

d) That the OCS Kasagam Police Station contacted the ecosystem conservator with Kenya Forest Service who assessed the extent of damage which was valued at Kshs. 325,352.20/- as per the annexed assessment report.

e) That in the circumstances, it is crucial that the Respondent be held in contempt of Court for disobedience of this Honourable Court's orders.

f) That the applicant will continue to suffer great prejudice if the application is not allowed and that it should be allowed in the interest of justice.

The application is opposed vide the 1<sup>st</sup> defendant's replying affidavit which is undated but filed on 01/02/21. The respondent opposes the application on the following grounds;

a) The application is frivolous and seeks to delay the hearing of the matter which is part heard.

b) The respondent is not aware of any order directing him not to use his parcel of land no. Kisumu/Kasule/6584.

c) That the order of status quo dated 09/06/16 meant that the respondent continues using his land the way he has been using it since he bought it and that the order was not confirmed on 30/06/16 when the application dated 18/04/16 was fixed for hearing; and that the order died the moment the plaintiff abandoned their motion in favour of a hearing.

d) Besides, the trees on the land are his and the assessment report is of no help to the plaintiff since the assessment was in respect of the respondent's trees.

e) That the Court should visit the land to ascertain the position on the ground as the Plaintiff has never lived on the defendant's land.

On 26/01/21, the Court gave directions for filing of submissions on the application. There are no submissions for either party on record. It is the applicant's case that the Court order of 09/06/16 for maintenance of status quo was by consent and that the said order Court order has not been set aside, appealed against or varied in any way. The respondent's case on the other hand is that the order was not on 30/06/16 and that it died when the plaintiff abandoned the application dated 18/04/16 for hearing of the main suit. I have looked at the Court Order given on 09/06/16. On that particular day, the plaintiffs' application for injunction dated 18/04/16 was coming up for hearing. The last part of the order reads;

**IT IS HEREBY ORDERED BY CONSENT THAT:**

1. The Notice of Motion Application dated 18/04/16 be and is hereby fixed for hearing on 30<sup>th</sup> June 2016.

2. The status quo be maintained.

I have also looked at the Court record in respect of the Court proceedings on 30/06/16. On that day, the Court gave the following directions;

a) The Plaintiff/Applicant granted leave to file and serve a reply to the replying affidavit in 14 days and defendant granted corresponding leave to file and serve.

b) The Preliminary Objection be heard before the Notice of Motion.

c) The Preliminary Objection fixed for hearing on the 22/09/16

d) Status quo be maintained.

On 22/09/16, though the preliminary Objection did not proceed for hearing, the Court extended the orders for the status quo. The next time the matter was in Court on 15/11/16, the P.O was dismissed for non-attendance by counsel for the defendant. M/s Kwado counsel appearing for the plaintiffs requested for a hearing date of the main suit on the basis that the plaintiffs and defendants had complied. The matter was then fixed for hearing on 15/3/17 on which date PW1 testified. The Counsel did not mention about extension of the status quo orders or the application dated 18/04/16, and that is how in my view the application died a natural death. It is noteworthy that on 23/10/17, Mr. Odumbe Counsel appearing for the plaintiff indicated to Court that there is no pending application by any party, this is despite the fact that the plaintiff's application was never heard and determined.

The court finds that the orders for status quo expired on 15/11/16 when the same were not extended. It is also my understanding that the orders as were couched in the court order of the 09/06/16 annexed to the applicant's application were to last until 30/06/16 when the application was to be heard. On 30/06/16 and 29/09/16 the same were extended but on 15/11/16 there was no extension of the same. On that particular day, Counsel requested for a hearing date of the main suit and not for the application. In any event and from the record, the Court never extended nor granted any orders in respect to the status quo pending the hearing and determination of the suit. In *Kimanya Kamau (Suing as the personal representative of the representative of the estate of GIDEON Gitundu Kimere-deceased v Francis Mwangi Mwaura & another [2018] eKLR*, the Court found that, the orders that had been issued on the 18/9/2013 were not extended and did expire on the 7/10/2013 when the hearing of the application was to take place.

The law guiding the present Application of contempt is *Order 40 Rule 3(1) of the Civil Procedure Rules* which provides

**'In cases of disobedience, or of breach of any such terms, the Court granting an injunction may order the property of the person guilty of such disobedience or breach to be attached, and may also order such person to be detained in prison for a term not exceeding six months unless in the meantime the Court directs his release.'**

The Court in the above mentioned case of *Kimanya Kamau (Suing as the personal representative of the representative of the estate of GIDEON Gitundu Kimere-deceased v Francis Mwangi Mwaura & another [2018] eKLR*, stated that;

**'In order to succeed in civil contempt proceedings, the Applicant is duty bound to prove the following 4 elements; -**

- a. the terms of the Order (or injunction or undertaking) were clear and unambiguous and were binding on the Defendant;**
- b. the Defendant had knowledge of or proper notice of the terms of the Order;**
- c. the Defendant has acted in breach of the terms of the Order; and**
- d. the Defendant's conduct wa**

Having found above that there was no binding order os **deliberate.**'n the defendant, then automatically contempt of Court cannot hold in the circumstances as one of the requirements is proof of the existence of an order whose terms are clear and unambiguous. .

The applicant in prayer 4 of the application has prayed that the 1<sup>st</sup> Respondent be condemned to pay to the applicants Kshs. 325,352.20/- being the value of the loss occasioned to the plaintiffs by the 1<sup>st</sup> Defendant's act of contempt.

The defendant has not denied that he cut down the trees in the land parcel no. Kisumu/Kasule /6584. He

has stated that the trees are his and does not require permission to use them. The plaintiffs on the other hand also stated that the trees are his. The ownership of land parcel number Kisumu/Kasule/6584 is what is in issue on the main suit. Whereas the plaintiffs claim to have been in possession of the suit property since 1984, the 1<sup>st</sup> defendant claims he bought the property in 2013 and took possession immediately. He has the title deed a copy of which he has annexed to the replying affidavit. The Court is yet to determine the lawful owner of the suit property.

Aside from claiming ownership and possession of the property, none of the parties has presented anything over and above to show that they planted the trees and therefore entitled to the amount of Kshs 325,352.20/- as assessed by the Kenya Forest Service.

It is therefore my view that the applicant has not satisfied this Court that he suffered loss in the sum of Kshs. 325,352.20/- as alleged. The upshot of the above, it is my view that the application be dismissed with costs to the respondents and hearing of the main suit proceed on 5/07/21 as earlier scheduled.

DATED AT KISUMU THIS 29<sup>th</sup> DAY OF APRIL, 2021

ANTONY OMBWAYO

JUDGE

**This ruling 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 15<sup>th</sup> March 2019.**

ANTONY OMBWAYO

JUDGE