



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MIGORI**

**ELC CASE NO. 598 OF 2017**

**(FORMERLY KISII ELC CASE NO. 70 OF 2011)**

**NELSON N. OBUBA.....PLAINTIFF/APPLICANT**

**VERSUS**

**ITIRA MOKONO NYAMBWATANIA.....DEFENDANT/RESPONDENT**

**HON. ATTORNEY GENERAL.....INTERESTED PARTY**

**RULING**

**INTRODUCTION**

1. By Notice of Motion dated 15<sup>th</sup> February, 2021 the Plaintiff/ Applicant sought for the following orders: -

a) Spent.

b) Spent;

c) THAT this honourable court be pleased to hold the Defendant/ contemnor in contempt of this honourable court's orders of 17<sup>th</sup> October, 2018;

d) THAT this honourable court be pleased to issue an Order of committal to prison against the Defendant/ Contemnor for a period of six months;

e) THAT this honourable court be pleased to issue an order of general damages in favor of the Applicant against the contemnor;

f) THAT this honourable court be pleased to grant any other order or further orders to protect the dignity and authority of the Honourable court deemed expedient in the circumstances

g) THAT the Costs of this Application be borne by the contemnor.

2. The application is premised on the 11 grounds thereof and the Supporting Affidavit sworn by NELSON N. OBUBA on 15.02.2021. The applicant herein avers that vide an Application dated 17.10.2018, he sought for a stay of execution of the judgment and decree issued on 25.09.2018 pending the hearing and determination of the intended Appeal; which was subsequently heard and allowed.

3. It is the Applicant's contention that the Order for Stay of Execution was extracted and duly served upon the Defendant through his counsel on record. However, despite being fully aware of the said Order, the Defendant has blatantly disregarded and disobeyed the said order by interfering with the suit property, cutting down trees planted thereon and have been threatening to evict and harm him.

4. He further stated that the threats made against him by the Defendant was reported to the police vide OB No. 14/7/2021.

5. It is his claim that unless the honourable court grants the orders sought, he will continue to suffer prejudice.

6. The application was opposed. The Defendant/ Respondent filed both a Grounds of Opposition dated 09.03.2021 and a Replying Affidavit

sworn on 21.04.2021. In his Grounds of Opposition, he averred that the Application was made without any basis and denied committing the acts complained of by the Applicant and urged the court to visit the suit land or order a report to be filed in verification of the same.

7. In his Replying Affidavit; he deposed that he reported to the Kuria West Sub-County Forest Officer, one D.K. Terer and requested him to visit the site for purposes of ascertaining the allegations of cutting trees made by the Applicant. The Forest Officer visited the site and prepared his report dated 08.03.2021.

8. He further stated that he asked the OCS Isebania Police Station to visit the land to also confirm the allegations made by the Applicant on whether he was contravening the court order. The OCS visited the suit property in the company of other police officers, he annexed photos of the same.

9. On 22.09.2021, this court issued directions on the disposal of the Application herein by way of written submissions. The Applicant through the firm of Ombui Ratemo & Co. Advocates filed their submissions dated 22.11.2021 while the Defendant, through the firm of Kerario Marwa & Company Advocates filed his submissions dated 16.11.2021. I have read and considered the rival submissions and the authorities cited thereto in support of the respective claims and I have taken the same into account in arriving at my decision.

### **ISSUES FOR DETERMINATION**

10. I have taken into account the entire application, the Affidavit in support together with the annexures thereto, the Replying Affidavit and the annexures therewith, Grounds of opposition and the rival submissions. Consequently, it is my considered view that the only issue for determination arising therefrom is whether the Application dated 15<sup>th</sup> February, 2021 is merited and I shall proceed to discuss the same as hereunder;

### **ANALYSIS AND DISPOSITION**

#### **A) Whether the Application dated 15.02.2021 is merited.**

11. Section 5 (l) of the Judicature Act vests this court with the jurisdiction to entertain contempt proceedings and provides as follows;

***“The High court and the Court of Appeal shall have the same power to punish for contempt of court as is for the time being possessed by the High Court of Justice in England, and that power shall extend to upholding the authority and dignity of subordinate courts.”***

12. Contempt is defined in the *Black's Law Dictionary* as;

***" Contempt is a disregard of, disobedience to, the rules, or orders of a legislative or judicial body, or an interruption of its proceedings by disorderly behavior or insolent language, in its presence or so near thereto as to disturb the proceedings or to impair the respect due to such a body."***

13. In *Econet Wireless Kenya Ltd vs Minister for Information & Communication of Kenya & Another, Ibrahim J* (as he then was) in addressing the issue on contempt made the following sentiments: -

***"It is essential for the maintenance of the Rule of Law and order that the authority and the dignity of our Courts are upheld at all times. The Court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors. It is the plain and unqualified obligation of every person against or in respect of whom, an order is made by Court of competent jurisdiction, to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or void."***

(See also **Wildlife Lodges Ltd vs. County Council of Narok and Another [2005] 2 EA 344 (HCK)**)

14. It is common ground that this court granted Stay of Execution Order on the 17.10.2018 whose effect was to stay the execution of the judgment and decree issued on 25.09.2018 pending the hearing and determination of the intended appeal by the Court of Appeal. The nature of the said order was to preserve the substratum of the appeal so that the intended may not be rendered nugatory in the event of execution of decree.

15. The elements to be proved in contempt proceedings are well established; in order to succeed in civil contempt proceedings, the applicant has to prove;

(i) ***the terms of the order,***

(ii) ***Knowledge of these terms by the Respondent,***

(iii) ***Failure by the Respondent to comply with the terms of the order.***

***Upon proof of these requirements the presence of willfulness and bad faith on the part of the Respondent would normally be inferred...***

16. The terms of the order are not in dispute; the same were clear and unambiguous and the terms were binding on the Respondent herein. The Order in question was an Order for Stay of Execution pending the hearing and determination of the intended Appeal and whose effect was to preserve the substratum of the intended appeal.

17. The second element is on the knowledge of the terms of the order by the Respondent. It is the Applicant's position that the even though the judgment was delivered in the presence of both counsel, they still extracted the order and served the same upon the Defendant's counsel on record; he annexed a copy of the principal copy duly served upon the Defendant's counsel bearing his counsel's stamp as acknowledgment receipt of the service.

18. The Defendant on the other hand stated that he had not been personally served with the said Order as alleged and stated that there was no affidavit of service as proof of service of the said order and consequently he cannot be held to be in contempt of an order he had no knowledge about. On the flipside, he also denied committing the acts complained of by the Applicant and maintained that he has been in full compliance with the said orders.

19. On a perusal of the Ruling by the court issued on 17.10.2018; I have noted that the said ruling which was delivered by my predecessor G.M. Ong'ondo J. in the presence of the Defendant's counsel on record or a representative thereof. I do also note that from the Annexure 2 in the Applicant's Supporting Affidavit, the copy of the extracted order bears the defendant's counsel official receiving stamp and the same is an acknowledgment of service being effected. In the circumstances, I accordingly find that the Order was duly served upon the defendant's counsel on record and there is sufficient reason to believe that; the Defendant who exercised his right to be represented by his counsel of choice was duly notified of the terms of the said order by the said legal representative and is therefore deemed to have been fully aware of the terms of the stay of execution order dated 17.10.2018.

20. The 3<sup>rd</sup> element to be proved is whether there was a deliberate failure by the Defendant/Respondent to comply with the terms of the orders. Contempt proceedings are quasi-criminal in nature. The threshold/ burden of proof required in contempt of Court is higher than that in normal civil cases, and one can only be committed to civil jail or otherwise penalized on the basis of evidence that leaves no doubt as to the contemnor's culpability. (See *Mwangi H.C. Wangondu vs Nairobi City Commission, Nairobi Civil Appeal No. 95 of 1998*)

21. Similarly, Lord Denning in *Re Bramblevale Ltd* [1970] 1 CH 128 at page 137 stated that;

***“A contempt of court is an offence of criminal character. A man may be sent to prison for it. It must be satisfactorily proved showing that when the man was asked about it, he told lies. There must be some further evidence to incriminate him.”***

22. I have anxiously considered the Application herein and the responses thereto in totality. While the Applicant has annexed photographs of trees that appears to have been cut and an O.B No. 14/7/2021 at Isebania Police Station issued to him when he reported the threats claims; the Respondent on the other hand has also annexed to his Relying Affidavit a report by the Forest Officer at Kehancha dated 8<sup>th</sup> March, 2021 whose findings I wish to reproduce as hereunder;

*“on my visit, I established that, Plot No. BUKIRA/BUHIRIMONONO/557 was not interfered with and that no trees were cut as alleged. To the contrary, Plot No. BUKIRA/BUHIRIMONONO/246; whose owner is Mr. David Kerario, is where trees were being harvested...”*

23. The Appellant/ Applicant in response to the report filed by the Respondent from the Forest Officer submitted that the findings by the Forest Officer were mere allegations which would require the cross-examination of the said Officer on his purported report. It is important to note that the Applicant did not file any report from the Department of Forest in further support of his claims and/or to quantify the extent of the damage caused by the alleged acts of the Respondent. No application was also made before me requesting for the Forest Officer to be summoned for purposes of being cross-examined on the veracity of his report dated 08.03.2021. I thus find that the said report was unchallenged in the circumstances.

24. This court will not condone deliberate disobedience of its orders nor shy away from its responsibility to deal firmly with proved contemnors. It is the plain and unqualified obligation of every person against, or in respect of whom, an order is made by a court of competent jurisdiction, to obey it unless and until the order is discharged, set aside or varied. However, in doing so, the court must be guided by the rules of evidence and the burden placed on an Applicant seeking contempt to prove his/her allegations.

25. In view of the above, I find that the Applicant has failed satisfactorily prove that there was indeed deliberate and willful disobedience of the court orders issued on 17.10.2018 thus amounting to contempt of court to the required threshold.

## **CONCLUSION**

26. In conclusion, I accordingly find that the Application dated 15<sup>th</sup> February, 2021 is **not merited** and I proceed to dismiss the same with no orders as to costs. Further, wish to reiterate the terms of the Order of Stay of Execution and urge the Defendant to fully comply with the said Order to the letter.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MIGORI ON 8TH DAY OF FEBRUARY, 2022.**

**MOHAMMED N. KULLOW**

**JUDGE**

**Ruling delivered in the presence of: -**

Non-Appearance for the Applicant

Non-Appearance for the Respondent

Tom Maurice - Court Assistant