



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

ELC CASE NO. 136 OF 2015

BOAZ OKELLO.....1ST PLAINTIFF
JEREMIAH ABINA ONGARO.....2ND PLAINTIFF
DUKE NYABUTI.....3RD PLAINTIFF
JAIRO OMWOYO..... 4TH PLAINTIFF
STEPHEN OMBATI.....5TH PLAINTIFF
JOSEPH OGETO.....6TH PLAINTIFF
PETER NDUNGU..... 7TH PLAINTIFF
RASHID TOO.....8TH PLAINTIFF
JAMES NYANGAU.....9TH PLAINTIFF
SIMON SOMBO.....10TH PLAINTIFF
NICHOLAS LIBERA.....11TH PLAINTIFF
SAMWEL NDUNGU MUCHERU..... 12TH PLAINTIFF

VERSUS

DAVID KIMELI LETTING alias KOKWAS..... 1ST DEFENDANT
EQUITY BANK (K) LTD.....2ND DEFENDANT

RULING

[NOTICE OF MOTION DATED THE 12TH MAY, 2021]

1. The Plaintiff approached the court by way of the application dated 12th May 2021 seeking the following orders: -

(a) “Spent.

(b) *The Honourable Court be pleased to require the attendance of the 1st Defendant/Contemnor to appear before the Honourable Court.*

(c) *The Honourable Court be pleased to cite the 1st Defendant/Contemnor for disobeying/disregarding the court orders dated 4.12.2015, and the subsequent orders and directions.*

(d) *Consequent to prayer (3) herein above, the 1st Defendant/Contemnor herein be committed to jail for a duration not exceeding*

six (6) months and/or such other duration as the Honourable Court may deem fit and expedient.

(e) In the alternative to prayer 3 above, the Honourable Court be pleased to impose any other penalty upon the contemnor that can, in its discretion, be pleased to purge the contempt of the Court's Orders.

(f) Costs of this application be borne by the 1st Defendant/Contemnor.

(g) Such further and/or other orders as the Court may deem fit and expedient.”

The application is based on the ten (10) grounds marked (a) to (j) on its face, that the defendants have willfully defied the orders of the court dated 4th December, 2015 preserving the substratum of the suit as pertains the use of LR NO. ELDORET/MUNICIPALITY/BLOCK 24/KIPKENYO, by maintaining the status quo. That the 1st defendant has willfully defied the court order by tilling the suit property thereby blocking the access to the plaintiffs' homes. That the said defendant was aware of the existence of the court orders having been personally served the same and that his conduct amounted to a violation of the law, and interference with the course of justice. That the court ought to punish the contemnors in order to protect the integrity and dignity of this Court. The application is supported by an affidavit sworn by **Jairo Omwoyo**, the 4th plaintiff, sworn on the 12th May, 2021 in which he reiterates the same grounds. It is his case that sometimes in October, 2016 and subsequent years, and further in 2020, he saw the 1st Defendant enter onto the suit land, occupy it, till, cultivate and fence off the entire portion blocking their access to their homes. They annexed four photographs marked **JO - 2 (a to d)** to attest to the same. He further averred that they had been marooned in their homes and any attempts to reason with the 1st Defendant had been met with hostility. That the 1st Defendant's actions had occasioned upon them perpetual hardship, especially in light of the effect it has on his school-going children. That the 1st Defendant had occupied the section which was their official access, cultivated the same and left huge gully that affected them, while the status quo order was still in force.

2. That in response, the 1st defendant filed the replying affidavit sworn on the 26th May, 2021 denying being in disobedience of the court's orders. That it is his case that he has only ploughed the portion of the suit land not claimed by the plaintiffs, and has not blocked their access. That he had neither erected a fence around the Plaintiffs' homesteads nor done any action to land lock their homes. He annexed eight (8) photographs marked **DKL 1 to 8** to show the access thereupon. He also denied having left huge gully on the access to the Plaintiffs' homes, and added that the trench is in his portion of the suit land. That he has only continued using his land as he has been doing since 2015.

3. That following directions issued by the court on the 17th May, 2021 and 29th September 2021, the learned counsel for the plaintiffs and 1st defendant filed and exchanged their submissions dated the 14th June, 2021 and 21st June, 2021 respectively.

4. In the submissions in support of the application, the counsel for the plaintiffs' urged the court to be guided by the decision in **Fred Matiang'i, the Cabinet Secretary, Ministry of Interior and Co-ordination of the National Government v Miguna Miguna & 4 others [2018] eKLR**, where it was held that there existed an unqualified obligation to obey court orders, unless where such orders had been discharged. The counsel urged the court to frown upon the 1st defendant's actions and punish him appropriately. That attached to the submissions are four (4) photographs.

5. That the counsel to the 1st defendant submitted that the status quo orders allowed each party to keep utilizing the portion of the suit property that he was using before the orders were in place. He reiterated that the plaintiffs' claim only relates to a section of the suit property, while the rest remained in the hands of the 1st defendant. He also submitted that the land was next to a road, and to facilitate farming and prevent farm crops from being destroyed by animals, fencing had to be done. The counsel further submitted that they had demonstrated through the replying affidavit that the plaintiffs had unhindered access to the public road from their parcels of land. He conceded fencing had been done, but that it wasn't in a manner to hinder ingress and egress from the plaintiffs' land.

6. The following are the issues for the court's determinations;

(a) *Whether the actions complained amounts to disobedience of the court order on the part of the 1st defendant.*

(b) *What order to issue under the circumstances?*

(c) *Who pays the costs of the application?*

7. That after carefully considering the grounds on the application, the affidavit evidence, submissions, superior court decision cited thereon, the court comes to the following findings;

(a) That the Contempt of Court Act was nullified in the decision **Kenya Human Rights Commission v Attorney General & another [2018] eKLR**, which decision returned the examination of contempt of court to the Judicature Act. This history has been rehashed in multiple suits among them **Samuel M. N. Mweru & Others v National Land Commission & 2 Others [2020] eKLR**, where *Mativo J* stated the following as regards the test for contempt of Court: -

“40. It is an established principle of law that [45] 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, but the Respondent could rebut this inference by contrary proof on a balance of probabilities.[46] Perhaps the most comprehensive of the elements of civil contempt was stated by the learned authors of the book Contempt in Modern New Zealand [47] who succinctly stated:

"There are essentially four elements that must be proved to make the case for civil contempt. The applicant must prove to the required standard (in civil contempt cases which is higher than civil cases) that:

- (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 was deliberate." (emphasis mine)*

That in this suit, the 1st defendant has not denied being aware of the court's orders and the terms therein. The only issue of contestation is whether the 1st defendant's actions amounted to breach of this court's orders. The court has to examine the actions alleged to amount to breach of the orders and determine whether contempt was committed.

(b) That the plaintiffs' case is that contempt has been committed by; (a) cultivating the suit property, and by (b) fencing the suit property in such a manner as to deny the plaintiffs' access to their parcels of land. The photographs annexed to the affidavits of the 4th plaintiff and 1st defendant may possibly have been taken from the same parcel of land but from different angles and differs in what they have captured. The photographs demonstrate that some agricultural activity was ongoing and fencing of the suit property. That on the face of it, one cannot be certain that the portion of the land shown in annexure **JO-1b** and **JO-1c** is the same due to their differences in size and the extent of activity thereon.

(c) That the burden in civil suits of proof of establishing any fact rests with the party raising the allegations. This is set out under **Section 107 of the Evidence Act, Chapter 80 of Laws of Kenya**, wherein it provides:

"(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person."

That the 1st defendant has in his replying affidavit denied the plaintiffs' claim that he has acted contrary to any court order. He has annexed photographs to counter those provided by the 4th plaintiff, and it is apparent they show some access to the portions of the land captured thereon. The contents of those photographs have not been challenged through a further or supplementary affidavit, and the court finds the plaintiffs' assertion that the 1st defendant has blocked their access to their portions of land, by cultivating and fencing of the suit property has not been proven on a balance of probabilities.

(f) That it is undisputed that the main suit pertains to only a part of the property known as ELDORET/MUNICIPALITY/BLOCK24/KIPKENYO. The 1st defendant has been on the rest of the land and it is on that portion that he claims that he carries out the alleged agricultural activities. That for the plaintiffs to succeed, it was incumbent that they provide evidence that demonstrated that the portion of the land cultivated and fenced by the 1st defendant, was that part of the suit property subject of this dispute. That could have been done through providing photographs of the whole suit land, or alternatively, sketches of the entire land, and tendering evidence of the portion in dispute, and the activities complained of in the disputed section, to enable the court get more perspective on the activities complained of, so as to determine whether they occurred in the disputed section of the suit property. That in the case of ***Stephen K Sang & another v Chebii Boiyo & another [2021] eKLR***, the court was dealing with an application for citation of contempt of the court's orders of maintaining status quo on disputed land. The court proceeded to examine the probative value of photographs attached to prove contempt, and was concerned that the photographs were undated and unable to prove that the activity on the suit land occurred at a time when the orders mandating maintenance of the status quo existed. That the Evidence Act, and in particular section 9 provides that: -

"Facts necessary to explain or introduce a fact in issue or relevant fact, or which support or rebut an inference suggested by such a fact, or which establish the identity of anything or person whose identity is relevant, or fix the time or place at which any fact in issue or relevant fact happened, or which show the relation of parties by whom any such fact was transacted, are relevant in so far as they are necessary for that purpose."

The photographs which the plaintiffs heavily relied on are inadequate to aid the application for contempt. That based on the foregoing, the court finds that the allegation that the 1st defendant committed contempt by disobeying the court orders on maintaining status quo has not been proved on a balance of probabilities.

(g) That on the assertion that the 1st defendant's fence had blocked and marooned the plaintiffs in their land has also not been demonstrated in view of the photographs presented by the 1st defendant that shows a gate and an access road allegedly to the plaintiffs' homes. That despite the foregoing findings, the court wishes to reiterate that the parties herein have a duty to ensure all court orders are always complied with. That where a party is not happy with any court order, the recourse is to move the appropriate court through an appeal or review proceedings. That further, though the plaintiffs have failed to prove their assertion of contempt to the required standard of proof, nothing precludes them from filing another application that clearly demonstrates their complaints. This Court is a court of justice and any proven allegations of contempt will be punished appropriately.

8. That flowing from the findings above the plaintiffs' application against the 1st defendant is without merit and is hereby dismissed. That however, and so as to encourage the parties to channel their energy to the main suit, the court directs that the costs of the application be in the cause.

It is so ordered.

DATED AND VIRTUALLY DELIVERED THIS 3RD DAY OF NOVEMBER, 2021.

S. M. KIBUNJA

ENVIRONMENT AND LAND COURT JUDGE

IN THE PRESENCE OF:

PLAINTIFFS: ABSENT

DEFENDANTS: ABSENT

COUNSEL: MR. ODHIAMBO FOR PLAINTIFFS AND MR. MOMANYI FOR 1ST DEFENDANT

CHRISTINE: COURT ASSISTANT