



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 508 OF 2017

CAROLINE SABIRI MANYANGE.....PLAINTIFF

VERSUS

NJERI ENE YAILE.....1ST DEFENDANT

MARGARET YAILE.....2ND DEFENDANT

RULING

The application before me for determination is the Defendants' Notice of Motion dated the 13th November, 2017 brought pursuant to Order 40 rule 3(1) of the Civil Procedure Rules, Section 63 (c) and (e) of the Civil Procedure Act and all the other enabling provisions of the law.

The Defendants' are seeking the following orders:

1. That the Respondent herein be committed to civil jail.
2. That the Respondent be restrained by herself, agents, or persons acting on her behalf from working, encroaching and or interfering on the disputed property.
3. That the costs of the application be provided for.

The application is premised on the summarized grounds where the Applicants aver that on 15th August, 2016 the Honourable Court delivered a ruling where it issued an inhibition order against any dealings with the suit property pending the hearing and determination of the main suit. The said ruling was delivered in the presence of the Counsels' for the Applicants as well as the Respondent. Despite the said ruling, the Plaintiff continues to defy the court orders by fencing the suit property, carrying out work on the land and when challenged by the Applicants, she rushes to court and lays false and fake charges against the Applicants. Further, that despite knowledge of the court order, the Plaintiff is working on the disputed property by digging water borehole, fencing, tilting and putting up latrines thereon. The Applicants contend that the Plaintiff has interfered with the suit property and this is a blatant display of contempt of the Court Order which, is an affront to the dignity of the Court and it is in the interest of justice that she be committed to civil jail.

The application is supported by the affidavit of NJERI ENE YAILE the 1st Defendant herein who deposes that the Plaintiff has on various dates encroached on the suit land contrary to the court order issued on 25th September, 2017 that granted inhibition orders against any dealings and or interference with the suit property and that on 14th July, 2017 a status quo order had been issued. She avers that the Respondent has disobeyed the Court Order and should be committed to civil jail for a period of six months.

The application is opposed by CAROLINE SABIRI MANYANGE, the Plaintiff/ Respondent who deposes that the disputed property is KAJIADO/ OLCHORO ONYORE/13165 as subdivided into KAJIADO/ OLCHORO ONYORE /20503 and KAJIADO/ OLCHORO ONYORE /20504 respectively, with the real subject in dispute being KAJIADO/ OLCHORO ONYORE 20503 as the 1st Defendant admitted the existence of a sale agreement in relation to KAJIADO/ OLCHORO ONYORE 20504. She avers that there were negotiations, whose terms are well known to the Applicants, where the 1st Applicant was to occupy one (1) acre of the land while she was to occupy the remaining portion. She insists the 1st Applicant reneged on the agreement and declined to sign the transfer documents culminating in the instant suit. She contends that the status quo at the time of filing the suit was that she occupies the one (1) acre of the suit property. Further, that the 1st Defendant is deliberately misleading the Court on the existing circumstances and she has failed to disclose material facts that the Plaintiff is cultivating on undisputed land KAJIADO/ OLCHORO ONYORE/ 13166. She reiterates that the 1st Applicant has not disclosed that her dispute in this suit only relates to KAJIADO/ OLCHORO ONYORE 20503, as she has no dispute over ownership of KAJIADO/ OLCHORO ONYORE 20504 since there was an agreement that the Plaintiff occupies one (1) acre. She denies disobeying the Court Order but insists she has clearly acted within its ambits and as per the status quo as existing at the time of filing the suit. She states that she has not fenced off the 1st Applicant's one (1) acre land as agreed by the parties during negotiations. She discloses that the 1st Applicant has put up a

structure in the said one (1) acre and cannot claim she has encroached on it, and if her allegations are true, then she is also in contempt of the Order of the Court. She confirms she has not in any way dealt with the suit property contrary to the orders of the court and the instant application is misplaced, misleading as well as a typical nuisance. Further, that the 1st Applicant has not established the basis for the grant of the orders sought, is guilty of non disclosure of material facts and should not be granted the orders sought as she will gain advantage unfairly against the principles of fair administration of justice. She states that committal to civil jail is a limitation of the right to liberty and the same cannot be obtained by misleading a court. Further, that the 1st Applicant has failed to establish to court which order was disobeyed and is being vexatious as well as driving a personal agenda of nuisance.

The Applicant filed a further affidavit in rejoinder to the Respondent's reply where she reiterated her claim and deposes that the only sale agreement between the Plaintiff and herself is for the sale of land parcel number KAJIADO/ OLCHORO ONYORE/ 13166 measuring 0.8 ha and that of one (1) acre of land parcel number KAJIADO/ OLCHORO ONYORE/20503. She contends that the Respondent is misguided in interpreting the ruling of the court dated the 25th September, 2017 as it does not relate to land parcel number KAJIADO/ OLCHORO ONYORE/ 13165 She insists the ruling was clear in terms of registration of an inhibition order on land parcel number KAJIADO/ OLCHORO ONYORE/ 13165 and that the Plaintiff is therefore deliberately attempting to circumvent the said ruling to defeat the ends of justice. She denies interfering with the suit property and putting up a structure thereon and claims it is the Plaintiff who continues to disregard the Court Order. Further, that the Plaintiff's claim that she failed to disclose all material facts pertinent to this case are false and an attempt to mislead the court.

The Applicants filed submissions and reiterated their claim. They argued that the Respondent was in contempt of court since the term of the order was clear; she had knowledge of the said order and her conduct is deliberate. They relied on the case of **Awadh Vs Marumbu No. 53 of 2004 eKLR** as well as the case of **Africa Management Communication International Limited Vs Joseph Mathenge Mugo & Anor (2013) eKLR** where Justice Mabeya held that allowing the breach of an injunction order to continue would sanction a contempt of court.

The Respondent filed her submission and insisted she was not in contempt of court as the order granted was registration of an inhibition order against the land parcel number KAJIADO/ OLCHORO ONYORE/ 13165 and there was no order of injunction. Further that she has not dealt with the property contrary to the Court Order. She relied on the case of **Africa Management Communication International Limited V Joseph Mathenge Mugo & another (2013) eKLR** to support her arguments. She submitted that contempt of court proceedings are meant to protect the administration of justice as well as the authority of the court and relied on the case of **Sam Nyamweya & 3 others V Kenya Premier League Limited & 2 others (2015) eKLR** to support this argument. Further, that the standard of proof in contempt proceedings is higher than the balance of probabilities and almost beyond reasonable doubt, which the 1st Applicant has not attained. She also relied on the case of **Africa Management Communication International Limited Vs Joseph Mathenge Mugo & Anor (2013) eKLR** in support of her arguments.

Analysis and Determination

Upon perusal of the materials presented in respect of the Notice of Motion dated the 13th November, 2017, the only issue for determination is whether the Plaintiff is in contempt of the Order of the Court dated the 25th September, 2017.

The Applicants contend that the Plaintiff is interfering with the suit land by digging water borehole, fencing, tilting and putting up latrines thereon and this is a blatant display of contempt of the Court Order and it is in the interest of justice that she be committed to civil jail. The Respondent on the other hand insists she is not in Contempt of Order of Court as the Applicant has misled the Court on the existing circumstances as she is cultivating on undisputed land KAJIADO/ OLCHORO ONYORE/ 13166. Further that the Applicant has not disclosed that her dispute in this suit only relates to KAJIADO/ OLCHORO ONYORE 20503, as she has no dispute over ownership of KAJIADO/ OLCHORO ONYORE 20504 since there was an agreement that the Plaintiff occupies one (1) acre. She denies disobeying the Court Order but insists she has clearly acted within its ambits and as per the status quo as existing at the time of filing the suit. She states that she has not fenced off the 1st Applicant's one (1) acre land as agreed by the parties during negotiations. She discloses that the 1st Applicant as at the filing of this response put up a structure in the said one (1) acre and cannot claim she has encroached on it, and if her allegations are true, then she is also in contempt of the Order of the Court. She reiterates that the 1st Applicant has bundled the issue of the undisputed property KAJIADO/ OLCHORO ONYORE/ 13166 measuring 0.8 hectares, and the adjacent land which has a dispute. She confirms she has not in any way dealt with the property contrary to the orders of the court and the instant application is misplaced, misleading as well as a typical nuisance.

Section 27(b) of the Contempt of Court Act **provides that a person who willfully and without lawful excuse disobeys an order or directions of a superior or subordinate court in the course of the hearing of a proceeding;**

While Section 28(1) of the Contempt of Court Act provides that 'save as otherwise expressly provided in this Act or in any other written law, a person who is convicted of contempt of court is liable to a fine not exceeding two hundred thousand shillings or to imprisonment for a term not exceeding six months, or to both.'

In the case of **North Tetu Farmers Co. Ltd v. Joseph Nderitu Wanjohi (2016) eKLR** where Justice Mativo stated that: ' **writing on proving the elements of civil contempt, learned authors of the book Contempt in Modern New Zealand have authoritatively stated as follows:-**

' 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 - (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

In the instant case, the order made by the Court on 25th September, 2017, read as follows:

'An inhibition order be and is hereby registered by the Land Registrar Kajiado as against Land Parcel Number LR KAJIADO/ OLCORO - ONYORE / 13165 which has been subdivided into parcel nos. 20503 and 20504 of any dealings including disposing of, transferring , leasing or charging pending the hearing and determination of the suit.'

I note the Court only made a note for the registration of inhibition against the suit land as it had emerged that the Plaintiff was already in occupation of part of the suit land. In the current scenario, the Applicants have not indicated to Court as to whether the Inhibition Order was registered by the Land Registrar, Kajiado and if, whether the Respondent interfered with it.

In the case of *Africa Management Communication International Limited Vs Joseph Mathenge Mugo & Anor* (2013) eKLR the Court observed that: **'to my understanding, it is unequivocal that, pursuant to section 63 (c) of the Civil Procedure Act, Order 40 Rule 3 (1) of the Civil Procedure Rules will only apply where the breach relates to orders of an injunction. Therefore, the power donated under section 63 of the Civil Procedure Act and Order 40 rule 3 (1) is only in respect of disobedience of an order of injunction. It is a specific power. '**

In relying on the legal provisions cited above including being persuaded by the judicial authorities above, I find that in the current circumstances and with the facts as presented, the Respondent did not interfere with the order of inhibition that was issued on 25th September, 2017. The applicants' allegations herein have not met the threshold required in contempt proceedings as envisaged by the law as the standard of proof in the said proceedings is higher than the balance of probabilities and almost beyond reasonable doubt, which position is well articulated in the case of ***Africa Management Communication International Limited Vs Joseph Mathenge Mugo & Anor* (2013) eKLR.**

It is against the foregoing that I find the application dated the 13th November, 2017 unmerited and dismiss it.

Costs will be in the cause.

Parties are urged to comply with Order 11 and set the suit down for hearing and determination of the dispute herein.

Dated, Signed and Delivered in Ngong this 4th October, 2018.

CHRISTINE OCHIENG

JUDGE