



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KITALE**

**ELC APPEAL NO. 82 OF 2018**

**MARTIN MACHARIA.....PLAINTIFF**

**VERSUS**

**PETERSON NJOROGE .....1<sup>S</sup>DEFENDANT**

**KITALE LAND REGISTRAR.....2<sup>ND</sup> DEFENDANT**

**HON. ATTORNEY GENERAL.....3<sup>RD</sup> DEFENDANT**

**AND**

**JOSEPH MARITIM.....1<sup>ST</sup> INTERESTED PARTY**

**EZEKIEL OYUGI.....2<sup>ND</sup> INTERESTED PARTY**

**JOSHUA ARAP CHUMO.....3<sup>RD</sup> INTERESTED PARTY**

**RULING**

1. This is a ruling in respect of the Plaintiff's/Applicant's Notice of Motion **21/9/2020** and filed on an even date.

2. The Application is brought under **Order 1, 40, 51 Rule 1** of the **Civil Procedure Rules, Section 3** and **3A** of the **Civil Procedure Act Cap 21, The Judicature Act Cap 8 of the Laws of Kenya**. The plaintiff seeks for orders as follows:

**1. ...spent**

**2. ...spent**

**3. ...spent**

**4. That this Honourable Court be pleased to issue a Notice to Show Cause why the said 1<sup>st</sup>,2<sup>nd</sup> and 3<sup>rd</sup> interested parties should not be committed to civil jail for a period not exceeding six (6) months for open/fragrant disobedience of the order of Honourable Justice Mwangi Njoroge (Mr.) dated 14/11/2018**

**5. THAT this Honorable Court be pleased to commit the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> interested parties to Civil jail for a period not exceeding six (6) months for open disobedience of the orders of Hon. Justice Mwangi Njoroge dated 14/11/2020**

**6. THAT the costs of the application be provided for.**

3. The grounds upon which the Applicant relies are that this court by an order dated **14/11/2020** granted a temporary injunction restraining the **1<sup>st</sup>** and **2<sup>nd</sup>** defendants by themselves, agents, servants and or any other body claiming through them from developing, trespassing, construction, selling, charging, disposing off, transferring, letting, leasing, alienating, or tempering with the registered and/or in any other manner interfering with all that parcel of land known as **LR NO. KITALE MUNICIPALITY/BLOCK 2/TUWAN/2756** pending the hearing and determination of this suit; that on several occasions, the **1<sup>st</sup>** and **2<sup>nd</sup>** interested parties who are agents and/or persons claiming through the **1<sup>st</sup>** defendant have trespassed the suit premises and started digging holes for the purpose of erecting a fence and have threatened the plaintiff with forceful eviction; that on several occasions the **3<sup>rd</sup>** interested party who is an agent of and a person claiming through the **1<sup>st</sup>**

defendant has alienated the suit premises and has verbally threatened to demolish the rental houses erected on the suit premises; that the action of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> interested parties is a clear contravention of the express orders dated **14/11/2018** and they are clearly in contempt of court; that court orders are granted to be obeyed by all and sundry including the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> interested parties; that by their actions the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> interested parties have held this honorable court in contempt and the authority of this court continues to be eroded and that it is fair and in the interest of justice to grant the orders sought.

4. The application is supported by an affidavit sworn by **Martin Macharia Kamau** on **21/9/2020** which reiterates the grounds above.

5. The application is strongly opposed. The 1<sup>st</sup> interested party **Joseph Maritim** filed a Replying Affidavit sworn on **5/11/2020** and filed on **9/11/2020**. He deposes that the applicant's application is devoid of any merits, bad in law and fatally defective; that he has not trespassed and neither has he dug any holes and fenced the plaintiff's land as alleged; that he is not an agent of the 1<sup>st</sup> defendant and neither does he work for him, nor does he claim through the 1<sup>st</sup> defendant; that he has never been served with any court order and as such, the application filed herein is misconceived; that there is no court order that he has disobeyed; that he has not threatened the plaintiff with any eviction as he does not have any interest in his land; that one can only be held to be in contempt of the court order if the same is directed to that particular party and the same served on that party; that the order dated **14/11/2018** was particularly directed to the 1<sup>st</sup> and 2<sup>nd</sup> defendants herein but not to him and that the application should be dismissed with costs.

6. The application was disposed by way of written submissions. The 1<sup>st</sup> interested party filed his submissions on **20/11/2021**. However none has been filed to date on behalf of the Applicant and the 2<sup>nd</sup> and 3<sup>rd</sup> interested parties.

#### **ANALYSIS AND DETERMINATION**

7. I have carefully considered the application, the affidavits on record the annexures and the submissions filed. The issue for determination is whether the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> interested parties should be cited for contempt of a court order dated **14/11/2018** and whether they should be committed to civil jail for not less than six (**6**) months.

8. **Black's Law Dictionary (Tenth Edition)** defines contempt of court as:-

**“Contempt is a disregard of, or 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.”**

9. **Section 29 of the Environment and Land Court Act** stipulates that:

**“...Any person who refuses, fails or neglects to obey an order or direction of the Court given under this Act, commits an offence, and shall, on conviction, be liable to a fine not exceeding twenty million shillings or to imprisonment for a term not exceeding two years, or to both.”**

10. In the case of **HADKINSON -vs- HADKINSON (1952) 2**

All ER. 567, it was held that:

**“It is the plain and unqualified obligation of every person against or in respect of, who an order is made by a 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 even void.”**

11. Further, in the case of **North Tetu Farmers Co. Ltd v. Joseph Nderitu Wanjohi [2016] eKLR Justice Mativo** stated thus:

**“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 breach of the terms of the order; and**

**d. The defendant's conduct was deliberate.”**

12. He who alleges must prove. **Section 107 of the Evidence Act** states that 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. In respect of the instant application, the

Applicant is under the obligation to prove that indeed the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> interested parties are in contempt of the court order dated 14/11/2018.

13. As submitted by the 1<sup>st</sup> Respondent's counsel, the standard of proof in contempt of court proceedings is that of beyond reasonable doubt. In **James Gachiri Mwangi V John Waweru Muriuki & 3 Others [2020] eKLR** the court held that:

**“.....Contempt proceedings are of a criminal nature and involve, if proved, loss of liberty. The applicant must therefore endeavor to prove all facts relied on by way of evidence beyond reasonable doubt.....”**

14. Further in **Kasembeli Sanane Vs Manhu Muli alias Fredrick Saname & 4 Others (2013) eKLR** which was cited with approval in the case of **Njuguna Holdings Limited v Tana Mining Company Limited (2015) eKLR** it was held that “proof of contempt of court must be beyond reasonable doubt.”

15. Has the applicant satisfied the conditions precedent for the court to grant an order citing the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> interested parties for contempt?

***(i) Whether the terms of the order were clear and unambiguous and if they were binding on the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> interested parties.***

16. I have perused through the court record and the court order dated 14/11/2018. I note that the Plaintiff filed a plaint together with a Notice of Motion on 17/8/2018 against the Defendants; that later, he filed an amended Notice of Motion on 19/9/2018. The application was heard and determined culminating to a court order dated 14/11/2018.

17. I have also perused the court order and find in my view its terms are clear and unambiguous; the language used in the order is plain English which in my view can be read and understood without any difficulty.

18. The second limb of this issue is whether the terms of the order were binding upon the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> interested parties. I have read through the court order and note that the order was clear as to who the order was directed to; it reads:

**“.....1). THAT a temporary injunction be and is hereby issued restraining the 1<sup>st</sup> and 2<sup>nd</sup> defendants/ respondents by themselves, agents, servants, and/or any other body claiming through them from developing, trespassing, constructing, selling, charging, disposing-off, transferring, letting, leasing, alienating or tempering with the register and/or in any other manner interfering with all that parcel of land LR. No. Kitale Municipality Block 2/Town/2756 until hearing and determination of this suit.”**

19. From the above, I have no doubts in my mind to conclude that the order was directed to be obeyed and was binding upon the defendants. Further I also note that by the date the order was issued, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> interested parties were not parties to this suit; they were enjoined to the suit on the 29/10/2020 as interested parties while the order was already in place.

20. In my considered view, obligations of the interested parties if any, and which I do not think there were, could only have arisen on the 29/10/2020 when they were enjoined as parties to this suit. Clearly, the order was not in any way addressed to them on the 14/11/2018 as they were not parties to the suit.

21. It is the applicant's contention that the interested parties were agents of the 1<sup>st</sup> defendant and/or were claiming through him. However, there is no evidence advanced by the applicant before this court to prove that indeed there existed an agency or employer-employee relationship between the 1<sup>st</sup> Defendant and the interested parties herein; the 1<sup>st</sup> interested party in his replying affidavit was consistent that he is not an agent of the 1<sup>st</sup> defendant and that he was not claiming through him also that he was not working for the 1<sup>st</sup> defendant. The denial of the allegation that the 1<sup>st</sup> interested party was an agent of the 1<sup>st</sup> defendant shifted the burden of proof on the applicant to establish that he was. That fact was never controverted by the Applicant, and the 1<sup>st</sup> interested party cannot therefore be deemed an agent of the 1<sup>st</sup> defendant.

***(ii) Whether the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents had knowledge of or proper notice of the terms of the order***

22. As I have said earlier, the interested parties were not parties to the suit when the order was issued. It is not in dispute that they were not even aware of the existing court order. If they had been parties to the suit then, the order might have been binding on them depending on whether the terms of the order were directed at them. If they were parties to the suit and the terms of the order expressly bound them then the applicant was under the obligation to serve them with the court order. The Applicant has not demonstrated that he effected service of the order upon them once he considered them agents of the 1<sup>st</sup> defendant; there is no affidavit of service filed before this court to prove such service. Service is required in law to be effected upon an individual not the whole world. For that reason I conclude that the interested parties had no knowledge of the subject order.

***(iii) Whether the interested parties have acted in breach of the terms of the order***

23. To sum up, it is my considered view, having found that the court order was not binding upon the interested parties herein that there is nothing that has been advanced by the applicant to convince this court to conclude that the interested parties are in breach. The applicant has annexed photographs which he claims that the interested parties have dug holes for fencing and that is his evidence of what he considers breach of the court order; however, as this court has found that the order was not binding upon the interested parties, I find the applicant's allegations baseless.

24. That being the position, it is in my considered view that in dealing with the suit land by engaging in activities alleged by the applicant, the interested parties could not be said to have conducted themselves deliberate in breach in any manner since the order was not known to them.

25. The upshot is that the application dated **21/9/2020** fails in its entirety and is hereby dismissed with costs to the Respondents.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 3RD DAY OF MAY 2021.**

**MWANGI NJOROGI**

**JUDGE, ELC, KITALE.**