



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAROK

ELC CASE NO. 45 OF 2019

OLENAPOE OWITI OLESOPIA

ALIAS SIMON SOPIA.....1st APPLICANT

SOPIA JACKSON RANKALO(suing as the legal

administrators of the Estate of Kamur Ole Tierikat).....2nd APPLICANT

VERSUS

LEKATOI OLE LETIEPOON

ALIAS TIEPON OLEKITUI.....RESPONDENT

RULING

The Applicant in this matter filed a Notice of Motion dated 8th July, 2020 seeking the following Orders:-

1. Spent
2. The honourable court be pleased to find and hold that the Respondent by himself, agents or servants has obeyed or disregarded the Orders of this Honourable court issued on 10th September, 2019 and in particular, the limb thereof whereby the Respondent was restrained or barred from interfering with the Applicants occupation, possession and a portion of L.R.No. TRANS-MARA/SHARTUKA/97.
3. The Honourable court be pleased to cite and punish the Respondent for breach and violation of the Orders of Temporary Injunction issued on 10th September,2019.
4. Consequent to prayer (3) hereinabove being granted, the Honourable court be pleased to issue warrants of arrest to bring the Respondent before the Honourable court for purposes of committal to jail on account of Disobedience and disregard of lawful Court Orders issued on 10th September, 2019.
5. Consequent to prayer (4) herein above being granted, the Honourable court be pleased to commit the Respondent to prison for a term not exceeding six months for disobedience and breach of the orders issued on 10th September, 2019 and or such shorter period as the court may deem fit and expedient.
6. Further in the alternative and without prejudice, the Honourable court be pleased to grant an order of Sequestration to attach the properties of the Respondent which properties be sold to defray the damages occasioned by the breach and disobedience of the lawful court orders of interim injunction issued on 10th September, 2019.
7. Costs of the Application be borne by the Respondent.
8. Such further orders be made as the court may deem fit and expedient.

The Application is premised on the grounds and the Supporting Affidavit of the Applicant sworn on 8th July, 2020 in which he avers that in total disobedience and disregard to the Orders of this court issued on 10th September, 2019, the Respondent has reverted to the suit property and erected a structure on the 10-acre piece of land and has further commenced cultivation of the same. Due to the actions of the Respondent, the Applicant is restrained from occupation and possession of the suit land. He avers that proper service of the Orders of the court issued on

10th September, 2019 were duly served upon the Respondent and as such the Respondent was fully aware of the temporary injunction issued against him. It is for the above reasons that the Applicant seeks that the Respondent be cited for disobedience of court Order and punished. The Applicant has attached the Orders of this court issued on 10th September, 2019, the Affidavit of Service sworn by Rajab O Otieno and pictures of the suit land.

The Application is opposed by the Replying Affidavit of the Respondent sworn on 12th October, 2020 in which he avers that the instant application is frivolous, vexatious, ill-intentioned and an abuse of the court process for the reasons that he was never served with the Application as alleged by the process server and further he had travelled to Nairobi on 16th September, 2019 and travelled back to his home on 20th September, 2019. That if there was any service thereof, either of his wives would have informed him which was not the case. The Respondent has attached a copy of the travel receipts dated 16/9/2019 and 20/9/2019.

The Applicant submits that the Orders issued on 10/9/2019 were express and did not require interpretation or further dissemination and that also it was a replica of the Orders granted on 16/9/2019. That the Applicant's contention that he travelled on the various date leaves room for doubt as the copy availed before this court appears to be written by the same hand. It is also the Applicant's submission that the Respondent has not made any application to court for cross examination of the process server and therefore the deposition of the Process Server remain correct. The Respondent has all along been aware of the grant of Temporary injunction issued against him and instead opted to disobey lawful court Orders. On the other hand, the Respondent submits that the Applicant has not met the threshold for contempt as required. He has further relied on several authorities and urges the court to dismiss the application.

I have analysed the Application, Replying Affidavit and the Submissions filed by both parties. The issue for determination therefore, is whether, the Respondent herein has wilfully disobeyed the Orders of the Court issued on 10th September, 2019. **Section 27 (j) of the Contempt of Court Act No. 46 of 2016 provides:** - 'A person who forcibly retakes possession of the land from any person who has recently obtained possession by an order of court commits an offence'. Such offence is punishable by a fine not exceeding two hundred thousand shillings or to an imprisonment of a period not exceeding six months or to both.

Section 27 of the Environment & Land Court Act provides 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.

In the case of **Charity Mpano Ntiyione V China Communications Construction Company Limited & National Environment Management Authority [2017] eKLR** the court held that there are three elements that must be proved in contempt proceedings: -

- a) Applicant must demonstrate terms of orders;
- b) Applicant must demonstrate knowledge of terms by Respondent; and
- c) Applicant must demonstrate failure of Respondent to comply with Court Order.

On whether the Applicant has demonstrated the terms of the Order, it is clear that the Applicant herein has demonstrated the particulars of the Order which in part reads '...thereof whereby the Defendant/Respondent was restrained and/or barred from interfering with the Plaintiff's'/Applicants' occupation, possession and/or use of a portion of L.R.No. TRANS-MARA/SHARTUKA/97, (hereinafter referred to as the suit property).

On whether the Applicant has demonstrated knowledge of terms by Respondent, I am satisfied that the Applicant has demonstrated knowledge of the terms by Respondent. The Affidavit of Service depones to personal service upon the Respondent by the Process server in the presence of Sergeant Antony Nyakanyie and the Area Assistant Chief David Ole Sein. The contention by the Respondent that he would have been informed by one of his wives if the Assistant Chief visited his homestead is far-fetched. The Respondent has not contested the presence of the Police Sergeant to his homestead. I do also note that the Respondent is represented by Counsel on Record and the same is without a doubt that he must have been informed in detail as to the contents of the Court Order.

Finally, in addressing the issue that the applicant must demonstrate failure of the Respondent to comply by the court Order, I rely on the case of **Mutiika Vs Baharini Farm Ltd, Civil Appeal No. 24 of 1985** where it was held that: - 'The standard of proof in contempt proceedings must be higher than proof on a balance of probabilities. The guilt of a contemnor has to be proved with such strictness of proof as is consistent with the gravity of the charge'. The photographic images as attached by the Applicant do not show where the pictures were taken from and exactly who took the pictures. I therefore see no evidence linking the pictures to the suit property.

Having stated the above, I decline to grant the Orders, the Notice of Motion Application is hereby dismissed with no Orders as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KILGORIS ON THIS 28TH DAY OF JUNE, 2021

MOHAMED N. KULLOW

JUDGE

In the presence of:

CA:Chuma

Mr Kipngetich for plaintiff/applicant

Mr Onderi N/A for the respondent