



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA

ELC CASE NO. 156 OF 2014

LEVINOUS KAKA OMUMALAKANI.....PLAINTIFF

VERSUS

JANE NASAMBU.....1ST DEFENDANT

PRISCAH NASIMIYU.....2ND DEFENDANT

CATHERINE NYAMBURA.....3RD DEFENDANT

R U L I N G

By a Judgment dated 23rd June 2015, **MUKUNYA J** directed the defendants to give vacant possession of the land parcel **NO BUNGOMA/NAITIRI/1907** (the suit land) to the plaintiff and remove all the illegal structures erected by them thereon. The Judge also enjoined the defendants from interfering with the suit land. He also awarded the plaintiff costs of the suit.

Subsequently, and pursuant to an application dated 20th April 2018, this Court delivered a ruling on 9th October 2019 and made the following orders: -

- 1. An order for the demolition of the defendants' buildings and other illegal structure on the land parcel NO BUNGOMA/NAITIRI/1907.**
- 2. An order for the eviction of the defendants from the land parcel NO BUNGOMA/NAITIRI/1907.**
- 3. The Officer Commanding MBAKALO POLICE STATION or the nearest Police Station or any Officers delegated under their command to provide security to M/S ESHIKHONI AUCTIONEERS with adequate security while executing the above orders.**

It would appear that the defendants either voluntarily vacated the suit land or were evicted pursuant to the orders issued by this Court. However, they returned to the suit land and put up other structures without the plaintiff's consent.

This prompted the plaintiff to move to this Court vide his Notice of Motion dated 4th March 2020 seeking the following orders: -

- 1. That this Honourable Court be pleased to cite the defendants for contempt of Court order by attaching their properties or committing them to jail for six (6) months or both.**
- 2. That this Honourable Court be pleased to lift the restriction lodged by the defendants on the land parcel NO BUNGOMA/NAITIRI/1907 on 27th November 2012.**

The application is premised on the grounds set out therein and is also supported by the affidavit of **LEVINOUS KAKA OMUMALAKANI** (the plaintiff herein).

The gravamen of the application is that the defendants have never appealed this Court's Judgment and although the order for their eviction was executed, they have returned to the suit land and put up other structures where they are now forcefully living.

The defendants have also lodged a restriction on the suit land since 27th November 2012.

When the application was placed before me on 3rd June 2021, I directed that it be heard by way of written submissions. And since the

plaintiff had already filed his submissions, I directed that the application and submissions be served upon the defendants who would then have 14 days from the date of service to file their responses and submissions. The case would then be mentioned on 21st June 2021 to confirm compliance and take a date for ruling. However, none of the parties attended Court on that day and though served, the defendants had not filed any reply nor submissions to the application. I therefore directed that ruling would be delivered on 12th July 2021 by way of electronic mail in keeping with the **COVID – 19** pandemic guidelines. However, since the defendants entered no appearances nor filed any defence and the trial had proceeded ex – parte, I shall be making appropriate orders later in this ruling.

I have considered the application, which is un – opposed, as well as the submissions by the plaintiff’s Counsel **M/S OTINGA OCHUME ADVOCATES**. Although this application is premised under the provisions of **Order 40 Rule 3** of the **Civil Procedure Rules** and **Sections 1, 1A, 3, 3A, and 63 c** of the **Civil Procedure Act**, it is essentially an application for contempt and for removal of a restriction on the suit land. An application shall not be defeated merely for citing the wrong provisions of the law. However, it is expected that where pleadings are drafted by Counsel, as in this case, they should as much as possible cite the relevant legal provisions. That is why Counsel has been retained in the first place.

It is clear that some six (6) years ago on 23rd June 2015, the Court entered Judgment against the defendants directing them to remove their illegal structures from the suit land and injuncting them from further interfering with the said land. Then on 20th April 2018, the Court made a further order that the defendants demolish their buildings and other illegal structures on the suit land and be evicted therefrom. The un – controverted evidence before me suggests that although the defendants left the suit land, they have returned and set up other illegal structures thereon. The defendants have never appealed the Judgment delivered on 23rd June 2015 or the subsequent ruling dated 9th October 2019. Indeed, they never defended the suit nor any of the two subsequent applications filed against them. There is a 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 until the order is discharged. Disobedience of such an order would, as a general rule, result in the person disobeying it liable to punishment for contempt – **WILDLIFE LODGES LTD .V. COUNTY COUNCIL OF NAROK & ANOTHER 2005 2 E A 344 (HCK)**. Obedience of Court orders is not optional. The defendants herein are clearly in contempt of the orders of this Court. The prayer that they be cited for contempt is well merited and I grant it.

The Green Card to the suit land shows that a restriction was lodged thereon on 27th November 2012 by **CATHERINE NYAMBURA** the 3rd defendant herein for reasons of “**suspected fraud.**” If there was any reason to suspect that the plaintiff’s registration of the suit land was obtained through a fraudulent process, the defendants should have defended the suit against them when it was filed as far back as 28th August 2014. But as is now already clear, they did not file any defence to the plaintiff’s suit and the hearing proceeded ex – parte culminating in the Judgment delivered on 23rd June 2015. The Green Card to the suit land shows that the plaintiff has been the registered proprietor thereof since 28th February 2012. As the registered proprietor of the suit land, the plaintiff is entitled to all the privileges and appurtenances belonging thereto and is, prima facie, the absolute and indefeasible owner thereof as provided in **Section 25 and 26** of the **Land Registration Act**. Having been served with this application, it was the duty of the defendants, and specifically the 3rd defendant who lodged the caution, to attend Court and respond to the same. They did none of the above. There is therefore no good reason why the restriction lodged on the suit land by the 3rd defendant on 27th November 2012 should not be removed as sought by the plaintiff.

Ultimately therefore and having considered the plaintiff’s Notice of Motion dated 4th March 2020, I make the following orders: -

- 1. The defendants are found to be in contempt of the orders of this Court. They be summoned to appear in this Court on 20th July 2021 for further orders. Summons be served by the plaintiff.**
- 2. The restriction lodged on the land parcel NO BUNGOMA/NAITIRI /1907 on 27th November 2012 is hereby removed.**
- 3. There shall be no orders as to costs.**

Boaz N. Olao.

J U D G E

15th July 2021.

Ruling dated, signed and delivered at **BUNGOMA** this 15th day of July 2021 by way of electronic mail. For the benefit of the defendants who did not defend this suit or any of the subsequent applications, I direct that a copy of this ruling and Judgment delivered on 23rd June 2015 and also the ruling delivered on 9th October 2019 be served upon them by the process server of this Court before 20th July 2021 when the matter will be mentioned.

Boaz N. Olao.

J U D G E

15th July 2021.