



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT HOMA BAY

ELC CASE NUMBER 5 OF 2021 (O.S)

(FORMERLY MIGORI ELC CASE NO. 67 OF 2019 (O.S))

DENISH ALEGO TENYE

(Suing on behalf of the estate of DIDACUS TENYE KAGOSE- Deceased)....APPLICANT

VERSUS

JOSEPH OLANG'O OGINGA.....1ST RESPONDENT

COLLINS OKINYI OYOO.....2ND RESPONDENT

RULING

1. The present ruling is concerning an application by way of a Notice of motion dated 10th July 2020 filed herein on 15th July 2020 pursuant to sections 3 and 3A of the Civil Procedure Act, Order 40 Rule 3 and Order 51 of the Civil Procedure Rules, 2010 and sections 5,25,27 and 28 of the Contempt of Court Act No. 46 of 2016 and all other enabling provisions of law. The plaintiff/applicant, Denish Alego Tenye (Suing on behalf of the estate of Didacus Tenye Kagose-Deceased) through M/S Abisai & Company Advocates is seeking orders that ;-

a) The Honourable be pleased to punish for contempt, the 2nd respondent herein for deliberately and in total disregard of the rule of law and the authority of the court disobeying the court orders made on 23/9/2019 and find him liable to be detained in civil jail for a term not exceeding six months or to attach her properties.

b) The Honourable court be pleased to order the 2nd respondent to reimburse the applicant rents collected from the suit property to the tune of Kshs. 31,500/= being monthly rent for the period between October 2019 and June 2020.

c) The cost of this application be provided for.

2. The anchorage of the application is the applicant's twenty (20) paragraphed supporting affidavit sworn on even date and the accompanying documents marked as "DAT-1 to DAT-4" inter alia, copies of this court's interim orders made on 16th September 2019 and issued on 17th September 2019 and the affidavit of service thereof (DAT-1 (a) and (b) as well as photographs (DAT-3). The same is also anchored on grounds 1 to 6 stated on its face which include that the respondents' action are contemptuous of the orders likely to expose this Honourable court's process to unwarranted ridicule

3. Briefly, the applicant complains that this court's orders of 16th September 2019 were duly served on the respondents who have trespassed onto the suit property, LR NO. KANYADA/KANYABALA/3100 as disclosed in the particulars of trespass at paragraph 11 (i) to (vii) of the supporting affidavit. That the applicant had been collecting monthly rent of three thousand five hundred shillings (Kshs. 3,500/=) from the seven rental houses on the suit property. That the respondents have threatened the applicant with arrest should he dare collect rent hence blatantly ignored the orders of this honourable court.

4. In a twelve (12) paragraphed replying affidavit sworn on 25th September 2020 and filed herein on 30th September 2020, the 2nd respondent through Robert Ochieng and Company Advocates, opposed the application. He deposed inter alia, that he did not challenge the injunctive application as the same was served upon him late and the instant application is a waste of the court's time.

5. The 2nd respondent further deposed that no orders were made by this court barring him from collecting rent on the suit property which he owns. That he has been collecting rent thereon and he has not been served with any court order to the contrary.

6. On 28th January 2021, this Honourable court ordered and directed that the application be canvassed by way of written submissions; see **Order 51 Rule 16 of the Civil Procedure Rules, 2010 and Practice Directions No. 33 of the Environment and Land Court Practice Directions, 2014.**

7. Accordingly, learned counsel for the applicant filed a four (4) paged submissions dated 16th February 2021 on 17th February 2021 giving brief facts of the application and the response to the same. Counsel identified twin issues for determination namely whether the order issued on 23rd September 2019 was breached and whether the 2nd respondent should be punished accordingly. In the analysis of the issues and the law, counsel urged the court to find in the affirmative. Reliance was made on the **Black's Law Dictionary 10th Edition** as regards the definition of "**Contempt of Court**", the cases of **Samwel M.N. Mweru and others vs National Land Commission and 2 others (2020) eKLR** and **John Kiragu Kimani vs Rural Electrification Authority (2018) eKLR.**

8. The respondent's counsel filed a 4-paged submission dated 19th April 2021 giving brief facts of the case and the issues arising therefrom including the alleged trespass and erection of structures on the suit property. Counsel relied on **Samuel Mweru case (supra)**, termed the applicant's claim unproved hence sought dismissal of the same with costs.

9. I have duly studied the application and the replying affidavit in their entirety alongside **the rival submissions** inclusive of authorities cited therein. I am of the considered view that the twin issues in the applicant's submissions are attractive and proceed to approve them for determination in this application.

10. It is common ground that the court's order of 16th September 2019 was issued and served on the 2nd respondent who is fully aware of its effect as stated in the penal notice at the foot of the order marked as DAT- 1 (a) and annexed to the application. So, the 2nd respondent was made aware of the order and served accordingly; see **Ogada vs Mollin (2009) KLR 620.**

11. The applicant asserted that the 2nd respondent has refused to obey the court order by way of trespass onto the suit property. The particulars thereof are set out in paragraph 11 (i) to (vii) of the applicant's affidavit in support of the application.

12. This court is aware of the definition of the term "**Trespass**" as per the **Black's Law Dictionary (supra) and Clerk and Lindsell on Torts, 18th Edition** in page 923. Furthermore, trenches dug across the plaintiff's land also amounted to trespass as held in the case of **James Njeru vs Ericson Keya Ltd (2015) eKLR**, among other authoritative pronouncements.

13. It was the contention of applicant that 2nd respondent breached the court order due to his acts of trespass onto the suit land. That the 2nd respondent should be punished as noted in **Samwel Mweru case (supra)**. Nonetheless, the procedure and courtesy required that since the applicant intended to rely on the decided cases cited in his submissions, he should have furnished the court and the 2nd respondent with a list of the cases in ample time for the 2nd respondent to have an opportunity of considering them as observed in the case of **Sera Auma Juma vs BAT (Kenya Ltd and another (1976-80) 1 KLR 751** and in consonant with **Article 48 of the Constitution of Kenya, 2010** on the right to access to justice.

14. It must be borne in mind that there is an unqualified obligation upon every person against or in respect of an order was made by a court of competent jurisdiction, to obey it unless and until it is discharged; see **Hadkinson vs Hadkinson (1952) 2 ALL ER 567.**

15. In the case of **Christine Wangari Gachege-vs-Elizabeth Wanjiru Evans and 11 others (2014) eKLR**, the Court of Appeal set the procedure of commencing contempt proceedings. It recommended the development of the Contempt of Court Act (supra).

16. The court indeed, has power to restrain by injunctive relief threatened contempt; see **Mutitika-vs-Baharini Farm Limited (1985) eKLR.**

17. The applicant alleged that the respondents breached this court's orders by trespassing into the suit land. However, the alleged trespass as set out in paragraph 11 of the applicant's supporting affidavit has not been demonstrated by the applicant as even the photograph (DAT-3) is far short of proving it. Moreover, and the rent schedule referred to (DAT-4) by the applicant has not been displayed herein.

18. It is noteworthy that contempt of court is a serious matter. It is criminal in character. In the instant scenario, the applicant has failed to prove the allegations of the respondents' violation of court orders to the requisite standards bearing in mind **sections 107 to 110 of the Evidence Act Chapter 80 Laws of Kenya**. I find the respondents' opposition to the application very solid and thus, the application is thwarted thereby.

19. In the result, the applicant's notice of motion dated 10th July 2020 and filed herein on 15th July 2020 is devoid of merit. I proceed to disallow it with costs in the cause.

20. It is so ordered.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT HOMA BAY THIS 22ND DAY OF SEPTEMBER 2021

G.M.A. ONGONDO

JUDGE

In the presence of:

Mr. Robert Ochieng, Learned Counsel for the respondent