



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAKURU

ELCC No. 38 OF 2020

ESTHER NYABOKE ONDARA.....PLAINTIFF

VERSUS

SUSAN NJERI1ST DEFENDANT

DISTRICT LAND REGISTRAR, NAKURU.....2ND DEFENDANT

GEORGE NJOROGE.....3RD DEFENDANT

RULING

1. This ruling is in respect of the plaintiff's Notice of Motion dated 27th April 2021, an application which seeks the following orders:

1. *[Spent]*

2. *THAT the Officer Commanding Station (OCS) Mwariki Police Station do supervise the peaceful execution and compliance of the court's orders made on 1st July 2020.*

3. *THAT this honourable court be pleased to find that SUSAN NJERI and GEORGE NJOROGE are in contempt of court for disobeying the court's orders made on 1st July 2020 and order that SUSAN NJERI and GEORGE NJOROGE should not be heard by the court until they purge the contempt.*

4. *THAT this honourable court be pleased to order that SUSAN NJERI and GEORGE NJOROGE be arrested and committed to civil jail for a term not exceeding six (6) months or be fined such sum as this honourable court deems fit.*

5. *THAT this honourable court be pleased to issue such other or further punitive orders in respect of the said contempt as may be necessary for the ends of justice to be met.*

6. *THAT the cost of this application be provided for.*

2. The application is supported by an affidavit sworn by the plaintiff. She deposed that when the 1st defendant began to lay claim to land parcel No. Kiambogo/Kiambogo Block 2/2103 (Mwariki) in 2020, she filed this suit and a temporary injunction was granted. That on 7th April 2021, the 1st and 3rd defendants and hired youths entered the suit property and pulled down the fence. She added that she approached the Officer Commanding Station (OCS) Mwariki Police Station who called the 1st and 3rd defendants and told them to stop interfering with the suit property.

3. She further deposed that the police officers at Mwariki Police Station gave her the 1st defendant's phone number being 0720891364 which number she in turn gave to her advocates on record. She added that her advocates served the order upon the 1st defendant on 7th April 2021 using the phone number. That she then fenced the plot and planted crops on it but the 1st and 3rd defendants went to the suit property on 19th April 2021, removed her fence and erected their own in violation of the orders of 1st July 2020.

4. The 1st and 3rd defendants did not respond to the application. Counsel for the 2nd defendant indicated that the application did not affect the 2nd defendant. Parties left the court to determine the application on the basis of the material on record.

5. I have carefully considered the application and the material on record. The plaintiff accuses the 1st and 3rd defendants of disobeying orders made by this court on 1st July 2020. The said orders were as follows:

1. THAT a temporary injunction be and is hereby issued restraining the 1st defendant whether by herself, her employees, servants, agents, or otherwise howsoever from entering, taking possession, occupying, charging, carrying on any development, disposing or dealing with all that parcel of land known as KIAMBOGO/KIAMBOGO BLOCK 2/2103 (MWARIKI) in any manner prejudicial to the interests of the plaintiff pending the hearing and determination of this of this suit.

2. THAT an order of inhibition be and is hereby issued to inhibit the registration of any disposition in the register of the land parcel KIAMBOGO/KIAMBOGO BLOCK 2/2103 (MWARIKI) pending the hearing and determination of this suit.

3. THAT an order be and is hereby issued to compel the District Land Registrar, Nakuru, the 2nd defendant, to issue a certified extract of the title in respect of KIAMBOGO/KIAMBOGO BLOCK 2/2103 (MWARIKI) to the Plaintiff forthwith.

4. THAT the costs of this application be borne by the defendants.

6. It is axiomatic that every person against whom an order is made by a court of competent jurisdiction and who has been made aware of such an order has a duty to obey it unless and until it is discharged. That requirement is non-negotiable. A party cannot choose the scope and manner of his compliance. See **Fred Matiang'i the Cabinet Secretary, Ministry of Interior and Co-ordination of National Government v Miguna Miguna & 4 others** [2018] eKLR.

7. It follows therefore, that an allegation of contempt of court is a serious matter since if proven, the liberty and property of the contemnor are at risk. In view of the gravity of such an allegation and the potential consequences, the standard of proof in contempt proceedings is higher than the usual one in civil proceedings of proof on a balance of probabilities. See **Mutitika vs. Baharini Farm Limited** [1985] KLR 229.

8. So as to succeed in an application for contempt, the applicant must demonstrate wilful disobedience. The order said to have been disobeyed must be clear enough as to leave no doubt as what is to be done or refrained from. The Court of Appeal reiterated these requirements in **Micheal Sistu Mwaura Kamau v Director of Public Prosecutions & 4 others** [2018] eKLR thus:

*... It is trite that to commit a person for contempt of court, the court must be satisfied that he has willfully and deliberately disobeyed a court order that he was aware of. That is made absolutely clear by section 4 of the Contempt of Court Act and the ruling of the Supreme Court in **Republic v. Ahmad Abolfathi Mohammed & Another ... Secondly, as this Court emphasized in **Jihan Freighters Ltd v. Hardware & General Stores Ltd** and in **A.B. & Another v. R. B.** [2016] eKLR, to sustain committal for contempt of court, the order of the court that is alleged to have been deliberately disobeyed must be clear and precise so as to leave no doubt as to what a party was supposed to do or to refrain from doing. Lastly, the standard of proof in committal proceedings is higher than proof on a balance of probabilities, though not as high as proof beyond reasonable doubt. ...***

9. The record herein shows that proceedings herein commenced through plaint filed on 15th June 2020. Only two defendants were named in that plaint: Susan Njeri as 1st defendant and the District Land Registrar, Nakuru as 2nd defendant. Those were the only defendants in the matter as at 1st July 2020 when the order said to have been disobeyed was made. The 3rd defendant was brought into the matter through Amended Plaint filed on 19th May 2021, over 10 months after the order said to have been disobeyed was made. Clearly, he was not party to the order and was not addressed by it.

10. Further, the record shows that the order of 1st July 2020 was issued on a date when the 1st defendant did not attend court. The applicant claims that the order was served on the 1st defendant through WhatsApp using telephone number 0720891364 which “the police officers at Mwariki Police Station gave” the plaintiff. No details are offered as to the identities of the officers who gave the number and how they ascertained that it was the 1st defendant’s telephone number. Neither the plaintiff nor her advocates claim to have used the said telephone number to communicate with the 1st defendant prior to the said alleged service.

11. **Order 5 Rule 22C** of the **Civil Procedure Rules** permits service through mobile-enabled messaging applications. The rule provides in part as follows:

(1) Summons may be sent by mobile-enabled messaging Applications to the defendant's last known and used telephone number.

(2) ...

12. It will be noted that the rule requires that the telephone number used must be the party’s **last known and used** telephone number. As is manifest from the discourse above, the applicant has not demonstrated that telephone number 0720891364 is the 1st defendant’s last known and used telephone number. Simply put, there is no proof of service.

13. In view of the foregoing, the applicant has failed to establish any wilful disobedience of the order dated 1st July 2020 either on the part of the 1st or the 3rd defendant. The higher standard of proof required in an application seeking to cite a party for contempt of court has not been met.

14. Pursuant to prayer 2 of the application before the court, the applicant sought an order that “the Officer Commanding Station (OCS) Mwariki Police Station do supervise the peaceful execution and compliance of the court’s orders made on 1st July 2020”. I am not persuaded

that I should grant such an order at this stage. That payer ought to have been included in Notice of Motion dated 15th June 2020, an application which I heard and determined on its merits through the orders of 1st July 2020. In any case, I see no role for the police in the enforcement of a restraining injunction. There are ample provisions in the **Civil Procedure Rules** to secure compliance with injunctions.

15. In the result, Notice of Motion dated 27th April 2021 is dismissed. Since the application was not opposed, I make no order as to costs.

Dated, signed and delivered at Kakamega this 16th day of September 2021.

D. O. OHUNGO

JUDGE

Delivered through Microsoft Teams video link in the presence of:

Mr Omae for the plaintiff/applicant

No appearance for the 1st defendant/respondent

Ms Wanjeri for the 2nd defendant

No appearance for the 3rd defendant/respondent

Court Assistant: E. Juma