



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT OF KENYA**

**AT KAPSABET**

**ENVIRONMENT AND LAND CIVIL APPEAL NO. 4 OF 2021**

**(FORMERLY ELDORET ELC CIVIL APPEAL NO 21 OF 2020)**

**AINEA KISALA.....APPELLANT/ APPLICANT**

**VERSUS**

**ELAM KISALA.....RESPONDENT**

**RULING**

1. This Ruling is provoked by the Notice of Motion dated 19.4.2021 by the Appellant/ Applicant who sought orders are follows;

- i) Spent.
- ii) The Honourable court be and is hereby pleased to cite the Respondent for contempt of court.
- iii) The Respondent be imprisoned for a term of six months and/or fined a sum of Kshs. 300,000/-
- iv) The costs of this application be provided for;

2. Hitherto and pursuant to an application dated 23.9.2020 the Applicant had on 14.10.2020 obtained two substantive orders, to wit,

- a) **“That a stay of execution of the Judgment dated 10.12.2018 and the resultant decree made by the Honourable Court in Kapsabet SPMCC 166 OF 2005 be and is hereby issued pending hearing and determination of this appeal;**
- b) **That a temporary injunction be and is hereby issued restraining the Respondent by himself, his agents and/or servants from altering the status of the suit land, NANDI/KOIBARAKA/469 in any way whatsoever including selling, leasing, charging, ploughing, cutting down trees, pending hearing and determination this appeal.”** .....( hereinafter referred to as the orders of the 14.10.2020)

3.The Applicant was further to obtain orders on 23.6.2021 in terms that:

- “a) spent
- b) that temporary orders stopping burial of the late Truphosa Adema Elam on the suit land is hereby issued for a period of 5 days.
- c)that the applicant to serve application within 2 days.”
- d)That hearing of application on 28.6.2021” ..... hereinafter referred to as the orders of 23.6.2021

4. The instant application thus seeks to cite the Respondent for contempt of court and for imprisonment for 6 months and /or kshs 300,000 fine upon adjudging the Respondent to have been in contempt of the above cited orders of this Honourable Court. The application is grounded on grounds, *interalia*; that during the pendency of the appeal the Respondent began altering the status of the suit land by cutting down trees, ploughing etc, and a supplementary affidavit deponing the burial of the late Truphosa Adema Elam (wife to the Respondent) on the suit property

## **APPLICANT'S SUBMISSION**

4. It is the Applicant's contention and submission that Respondent has contravened the above court orders made on 14.10.2020 on two occasions, firstly, by cutting trees, ploughing on diverse dates including 7.12.2020, 8<sup>th</sup> December 2020, 21<sup>st</sup> February 2021 and 12<sup>th</sup> April 2021 to 15<sup>th</sup> April. In support of this position the Applicant has annexed photographs as annexure AK23 A-C. Secondly, that despite existence of court orders made on 23<sup>rd</sup> June 2021 the Respondent proceeded to bury his late wife Truphosa Adema Elam on the disputed property.

5. The Applicant submits that the Respondent was not only aware of both court orders but was also served personally and for abundance of caution through his advocates and that he breached the said orders for which he ought to be punished. The Applicant submits and rightly so, that for a person to be held in contempt the court must be satisfied that;

- i) there was an order/directions capable of being obeyed and/or disobeyed
- ii) the offending party had knowledge of the said order.
- iii) That the offending party has breached and/or continues to breach the said orders.

6. In support of his submissions the Applicant has placed reliance on the decision of the Court of Appeal in **Shimmers Plaza Limited vs NBK EKL** as well as **Basil Criticos vs Attorney General & 8 others**. It is the Applicant's position that the suit property which the actions complained of is **NANDI/KOIBARAK 'A' /469**. The Applicant argues that **NANDI/ KOIBRAK 'A' /811** is a subdivision of **NANDI/KOIBARAK 'A' '469**.

## **RESPONDENT'S SUBMISSION.**

7. On his part the Respondent denies burying his wife the late Truphosa Adema Elam on **NANDI/KOIBARAK 'A' /469** but confirms that his said late wife was interred on his parcel of land known as **NANDI/KOIBARAK 'A' /811**, which is a first registration as opposed to a subdivision of **NANDI/KOIBARAK 'A' /469** and that the two properties are distinct.

8. The Respondent equally submits on the principles applicable to find a person to be in contempt. The Respondent however places reliance in the case of **Jihan Freighters Ltd vs Hardware and General Stores Ltd** and in **AB and ANOTHER VS R.B 2016 eklr** where the court observed that to sustain a committal for contempt of the court, the order that is alleged to have deliberately disobeyed must be clear and precise so as to leave no doubt as to what a party was supposed to do or refrain from doing.

9. The Respondent further submits that **NANDI/ KOIBARAK 'A' / 469** belonged to their late father James Kisala Andaye and that their other brother, and not the Applicant, is the Administrator of the said estate, in support of this position the Respondent has annexed a search over **NANDI /KOIBARAK 'A' / 811** showing him as the registered owner while a search for **NANDI /KOIBARAK 'A' /469** shows that the same is still registered in the name of the late James Kisala Andaye. The Respondent has further annexed P & A form 5 in Kapsabet SPMCC Succession Cause number 37 of 2020 relating to the Estate of the late James Kisala Andaye and **NANDI/KOIBARAK A /469** indeed forms part of that estate.

10. In response to the issue of ploughing and cutting down trees the Respondent vide paragraph 7 of the Replying Affidavit 23/4/2021 deposes that photographs are not from the suit property.

## **ANALYSIS AND DETERMINATION.**

11. From the above set of facts and submissions, this court is invited to determine whether the Respondent is in contempt of the court orders of 14.12.2020 and 23.6.2021. Both parties agree on the general principles with regard to contempt proceedings as set out in **Kristen Carla Burchell v Barry Grant Burchell (Case No 364 of 2005)**, cited by in **Katsuri Limited v Kapurchand Depor Shah** [2016] eKLR, the principles are;

- i) There was an order/directions capable of being obeyed and/or disobeyed
- ii) The offending party had knowledge of the said order.
- iii) That the offending party has breached and/or continues to breach the said orders.

12. Applying the above principles to the present application, indeed there were two orders issued by the Honourable court, as set out earlier in this ruling. The said orders were issued on 14.10.2020 and 23.6.2021. Were these orders capable of being obeyed and/or disobeyed? The answer to this is in the affirmative in that the Respondent was required to refrain from doing certain actions.

13. Was the offending party aware of the orders? I agree with the Applicant's counsel that the test of knowledge of the orders has evolved from the requirement of the personal service to knowledge of existence of orders. This was the position in **Basil Criticos vs Attorney General & 8 others eklr** where the court held inter alia. **'the law has changed and as it stands today knowledge supersedes personal service...where a party clearly acts and shows that he had knowledge of a court order, the strict requirement that personal service must be proved is rendered unnecessary'**.

14. The Respondent was represented by Counsel, it follows therefrom that he was aware of the court orders. The Applicant deposes at

paragraphs 15 ,16,17 and 18 of his Supplementary Affidavit of 30<sup>th</sup> June 2021 that the Respondent was aware of the orders since he was personally served with the applications and the resultant orders thereof. It follows therefrom that limb 2 of the principles for contempt above has equally been proven.

15. On the last issue of whether the Respondent had breached and/or continues to breach. Order b of the orders of 14.10.2020 was couched thus; **That a temporary injunction be and is hereby issued restraining the Respondent by himself, his agents and/or servants from altering the status of the suit land, NANDI/KOIBARAK'A'469 in any way whatsoever including selling, leasing, charging, ploughing, cutting down trees, pending gearing and determination this appeal.**” The said order was specific in that the prohibited actions were in relation to **NANDI/KOIBARAK'A'469**. Respondent has disputed burying the late Truphosa Adema Elam on the said parcel but has conceded that he buried her in **NANDI/KOIBARAK'A'811**.

16.He further adduced evidence that he owns the said parcel. The issue as to whether the parcel **NANDI/KOIBARAK'A'469** and **NANDI/KOIBARAK'A'811** are one and the same is a matter yet to be determined in the main appeal. As it stands now the parcels are distinct and hence the Respondent having buried his late wife on **NANDI/KOIBARAK'A'811** did not therefore breach the order of 23.6.2021.

17.The Respondent further denied cutting the trees and indicated that there was no proof that the cut downs trees were on parcel **NANDI/KOIBARAK'A'469** and the Applicant having had a chance to file a Supplementary Affidavit did not respond to this issue, it follows that the issue of breach of the order of 14.10.2020 with regard to cutting down of trees was not proved.

18. I agree with the Respondents submissions that the standard of proof in contempt cases and in committal proceedings is higher than proof on a balance of probabilities, though not as high as proof beyond reasonable doubt as was held by the Court of Appeal in **Mutitika vs Baharini Farm NALCIV APPLICATION NO.24 of 1985** cited by the Respondent.

19.Having reached the conclusion that there was no proof to the required standard of proof that the Respondent breached the court orders of 14.10.2020 and that the late Truphosa Adema Elam was buried in **NANDI/KOIBARAK'A'811**, the inevitable conclusion is that the Respondent is not in contempt of court and the Notice of Motion Application dated 19.4.2021 must therefore fail and is therefore disallowed.

20.Each party to bear its own costs.

**DATED AT KAPSABET THIS 18<sup>TH</sup> DAY OF OCTOBER 2021**

**JUSTICE M.N. MWANYALE**

**JUDGE OF THE ENVIRONMENT AND LAND COURT.**