



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT KISUMU

ELC NO. 46 OF 2020

RICHARD OTIENO.....1ST PLAINTIFF/RESPONDENT

JOSEPH OGUTU.....2ND PLAINTIFF/RESPONDENT

PAMELA ATIENO ODHIAMBO.....3RD PLAINTIFF/RESPONDENT

PATRICK OUMA.....4TH PLAINTIFF/RESPONDENT

MILKA OUTA.....5TH PLAINTIFF/RESPONDENT

JOSEPH OGADA.....6TH PLAINTIFF/RESPONDENT

NICHOLAS OTIENO.....7TH PLAINTIFF/RESPONDENT

MONICA AWUOR.....8TH PLAINTIFF/RESPONDENT

GODFREY ONYANGO.....9TH PLAINTIFF/RESPONDENT

PAMELA ATIENO.....10TH PLAINTIFF/RESPONDENT

-VERSUS-

MICHAEL OTIENO WAGUDE.....1ST DEFENDANT/APPLICANT

THE LAND REGISTRAR, KISUMU.....2ND DEFENDANT

RULING

INTRODUCTION

Michael Otieno Wagude, the 1st defendant/Applicant herein filed a Notice of Motion Application dated 11th August 2021 seeking orders that the 1st plaintiff/ Respondent be cited for contempt of court order and that the costs of this Application be provided for. The Application is supported by the Affidavit of Washington Athung'a Advocate on record for the Applicant who states that the 1st Plaintiff and 9 others were duly evicted from the 1st Defendant's parcel of land number KISUMU/DAGO/566 vide court order annexed herein and marked as MOW 1. He states that the said 1st Plaintiff has again trespassed and continue constructing illegal structures and farming thereon. That the 1st Plaintiff continue to use violence to deny the 1st Defendant access to his parcel of land lending him untold suffering hence poor health. That the 1st Plaintiff while armed with court order dated 1st September 2020 is using violence to deny the 1st Defendant access to the parcel of land hence be cited for contempt of court order and or Ruling dated 16th July 2021. That the Application is made in good faith.

The 1st Plaintiff filed a Replying Affidavit and deposed that the said application is misconceived, an afterthought and an abuse of the court process and that on the face of it, does not state which court order he has allegedly defied. That this Application is *sub judice* to the application dated 26th October 2020 which was later amended on 10th November 2020. That in the said Application, the Applicant herein sought to cite all Respondents for defying Orders of the Court. That to date the application has never been fixed for hearing. The application is fatally defective as it falls short of the requirements in the Civil Procedure Rules. That the only order in this suit is one issued by

Honourable Lady Justice M.A. Odeny on 1st September 2020 granting *status quo* over the suit property. That he has duly complied with the said order since its issuance. That the Applicant in defiance to the said Order instructed Sparknet Auctioneers who hired the Police Officers from Kisumu Police Station to periodically harass him to move out of the suit property thus prompting his Advocates on record to write to the Regional Commander seeking for his intervention to stop the said abuse. That the Applicant proceeded to subdivide the suit parcel number KISUMU/DAGO/566 on 6th January 2021 to create land parcel number KISUMU/DAGO/4721 and KISUMU/DAGO/4722.

That according to annexure 'MOW1' relied upon by the Applicant, the Order which the Applicant alleges that he has defied is with respect to land case number Kisumu ELC No. 13 of 2015 between the Applicant and Morris Olwal.

That the said order related to the eviction of the Defendant in that matter and that the said Order and the Penal Notice was not served upon him. That the Applicant has not demonstrated breach of the said order as alleged.

The respondent contends that if at all there is any breach of the said Order, then the same ought to be raised in the suit which the order originated from and not the present suit. He laments that he has not breached any order by this Honourable Court and that he is a law abiding citizen and a respectable member of the society incapable of acting contrary to orders of a court of law.

He believes that the Application before this Honourable Court has been made in bad faith and meant to taint his good reputation and that the Applicant seems to be shooting in the dark with hopes that at least one of the Respondents will be found in breach in that in the first Application he faults all Respondents for breaching the said order while in this application he is accusing him for the same breach. That it is in the interest of Justice that the Application be dismissed with costs. On 17th August 2021, the Application came up for Hearing and the court directed that parties to exchange submissions within 7 days.

The Applicant's Submissions

The 1st Defendant filed his submissions on 25th August 2021 wherein it is submitted that the 1st Respondent/Plaintiff in this matter should not only be cited for contempt of court but also for abuse of court process. The 1st Respondent/Plaintiff herein is the son of Maurice Olwal who was the Defendant in suit no. 13 of 2015 which was heard and determined and an order of eviction to that effect was issued. The Defendant in ELC 13 F 2015 proceeded and filed another case ELC No. 245 of 2017 where the parties were the same. The issue for determination was also the same and the land in question was ownership of land parcel number KISUMU/DAGO/566 which this court proceeded to strike out on 22nd May 2020 as the same was an abuse of the court and also res-judicata.

That on 13th March 2020, the 1st Plaintiff herein through the firm of BRUCE ODENY & COMPANY ADVOCATES moved court under certificate of urgency for stay of execution on judgment and decree dated 18th October 2017 in ELC No. 13 of 2015 where the 1st Plaintiff/Respondent herein was the 1st Plaintiff/Respondent in the said Application. The 1st Plaintiff herein also made an application to be enjoined in ELC No. 13 of 2015 as interested parties /Defendants which Application was supported by the Affidavit of MILKA OUTA. The 1st Respondent through the firm of Oguso & Okungu Advocates filed Grounds of Opposition.

That upon filing of Application and grounds of opposition by parties herein, the 1st Respondent filed a Replying Affidavit dated 6th April 2020 in this court and upon perusal of the documents and attached orders the court proceeded to give the Ruling on 16th July 2021 dismissing the said application for lack of merit.

The firm of Bruce Odeny filed an Application dated 24th July 2020 seeking stay of execution of eviction and plaint seeking permanent injunction restraining the 1st Defendant /Applicant from interfering in the suit parcel but failed to disclose to court that the Application dated 24th July 2020 was Res- judicata in that a similar application dated 13th March 2021 was still pending a Ruling before court in Kisumu ELC No. 13 of 2015 where the same was dismissed by this court on the 16th of July 2021. Both 3rd, 4th and 10th Plaintiffs filed application dated 5th September 2018 but filed in court on 6th July 2018 seeking similar orders in ELC No. 13 of 2015 through Siganga & Co. Advocates.

On 13th April 2021, the Application dated 24th July 2020 was placed before Honourable LADY Justice M.A. Odeny for hearing where Advocate for the 1st Defendant/Respondent prayed that the Application in ELC No. 46 of 2020 be stayed awaiting Ruling in Kisumu ELC No. 13 of 2015 before the matter could proceed for hearing and that was the order of the court with an order that the 'status quo' be maintained waiting ruling in Kisumu ELC No. 13 of 2015. That the 1st Plaintiff/Respondent herein in gross violation of court order proceeded to cultivate thereon hence this Application for contempt.

That by the time the 1st Plaintiff /Respondent herein moved the court vide an Application dated 24th July 2020, an order of eviction had already been issued by this Honourable court, decree extracted and Notice effected as such the status quo at the time was that the Plaintiffs/Respondents herein had already been evicted. The Applicant herein further submitted that the 1st Defendant/Applicant by filing Kisumu ELC No. 46 of 2020 is a gross violation of court process in that despite the pending of ELC No. 46 of 2020, Richard Otieno who appears to be the son of Morris Olwal who was evicted and subsequently sent to jail for contempt of court proceeds to mislead the court in gross violation disrespected court and entered into the parcel number KISUMU/DAGO/566.

The Applicant submitted that the 1st Plaintiff/Respondent herein is in breach and contempt of court and therefore prays that this court finds Richard Otieno and all other parties acting on his behalf for contempt of court, issue warrant of arrest to the said Richard Otieno and let Richard Otieno be committed to jail for contempt of court. That a Notice to Show Cause be issued to the law firm of BRUCE ODENY & COMPANY ADVOCATES to show cause why disciplinary action should not be taken against the said law firm for an abuse of court and due process.

The Respondent's Submissions

The Plaintiff/ respondent submitted that the Applicant herein has failed to appreciate the provisions of Order 51 Rule 13 920 of the Civil Procedure Rules which provides that every application shall bear at the foot the words **'if any party does not appear at the time and place above-mentioned such order will be made and proceedings taken as the court may think just and expedient.'**

That the wordings of Order 51 Rule 13 92) of the Civil Procedure Rules, 2010 are couched on mandatory terms and should therefore be strictly followed. Article 159 of the Constitution of Kenya, 2010 was enacted to prevent substantial justice from being defeated by procedural technicalities and that the exercise of jurisdiction of Article 159 is unfettered. That Article 159 was not aimed at conferring authority to derogate from express statutory procedure. The Application as it stands is therefore fatally defective to adhere to the requirements of Order 51 Rule 13 92) of the Civil Procedure Rules 2010.

The position of the law is that since contempt proceedings are quasi – criminal in nature, the standard of proof is higher than in civil cases. In order to prove civil contempt, the Applicant must prove to be the required standard that;

- a. The terms of the order (or injunction or undertaking) were clear and unambiguous and were binding on the Defendant;
- b. The Defendant had knowledge of or proper notice of the terms of the order
- c. The Defendant has acted in breach of the terms of the order
- d. The Defendant's conduct was deliberate.

That the order alleged to have been defied related to another case being Kisumu ELC No. 13 of 2015 where the court granted an eviction order against the Defendant in that matter being Morris Olwal and not the 1st Respondent herein. The Applicant has not furnished evidence of service of the said Order and its breach thereof in both the Application and Submissions filed. That the Applicant has not furnished evidence of service of the said Order and its breach thereof in both the Submissions and Application filed. The Applicant maintains that the said order was breached from the fact that at the time an Order was issued in this file maintaining the status quo, the 1st Respondent had already been evicted from the suit parcel of land. He further submitted that the Applicant is intentionally misleading this Honourable Court since the Applicant is well aware of the facts that lead to the grant of the orders sought.

The Applicant acted in defiance to the said orders by instructing Sparknet Auctioneers who hired Police Officers from Kisumu Police Station to periodically harass the 1st Respondent to move out of the suit property thus prompting the 1st Respondent Counsel on record to seek intervention from the Regional Commander. The Applicant in further defiance to the said orders proceeded to sub-divide the suit parcel of land on 6th January 2021 to create land parcel no. KISUMU/DAGO/4721 and KISUMU/DAGO/4722. They submitted that the 1st Respondent has not breached the orders of this Honourable court and if at all there is any defiance then nothing stops the Applicant from filing a contempt of court application in the file where the order emanated upon compiling sufficient evidence of the same.

That this Application is an abuse of this Honourable's court due process in that on 26th October 2020, the Applicant filed a similar Application seeking to cite all the Respondents for contempt of Court and later amended the same on 10th November 2020. The Application was duly responded to by the Respondents herein but has never been fixed for hearing and or withdrawn. The Applicant has instead filed the present Application seeking to cite the 1st Respondent only for contempt of the same order without sufficient evidence being adduced. The Applicant does not deny the existence of the previous Application and therefore the Applicant is using this Honourable Court's process to frustrate the Respondents with the hopes that at least one of them will be found in breach and committed to civil jail.

The 1st Respondent has demonstrated that he duly complied with the Honourable Court's Orders and no evidence to the contrary has been furnished. The 1st Respondent has adduced evidence showing breach by the Applicant. That the intention of the Applicant is clearly to harass the 1st Respondent through the court process and this should not be allowed by this Honourable Court and therefore this Application should be dismissed.

ISSUES FOR DETERMINATION

The main issue for determination is **whether the 1st Respondent is in contempt of the court order.**

Black's Law Dictionary 9th Edition, defines contempt as:

The act or state of despising; the conduct of being despised. Conduct that defies the authority or dignity of a court or legislature. Because such conduct interferes with the administration of justice.

Econet Wireless Kenya Ltd v Minister for Information & Communication of Kenya & another [2005] KLR 828, **Ibrahim, J.** (as he then was), underscored the importance of obeying court orders, stating:

It is essential for the maintenance of the rule of law and order that the authority and the dignity of our courts are upheld at all times. The Court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors. It is the plain and unqualified obligation of every person against whom an order is made by court of competent jurisdiction, to obey it unless and until the order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by the order believes it to be

irregular or void. (emphasis)

The Supreme Court of India in **Mahinderjit Singh Bitta v Union of India & Others** 1 A NO. 10 of 2010 (13th October, 2011):

In exercise of its contempt jurisdiction, the courts are primarily concerned with enquiring whether the contemnor is guilty of intentional and willful violation of the order of the court, even to constitute a civil contempt. Every party is lis before the court and even otherwise, is expected to obey the orders of the court in its spirit and substance. Every person is required to respect and obey the orders of the court with due dignity for the institution. (Emphasis).

I do find that the 1st Plaintiff herein and his father were duly evicted from the 1st Defendant's parcel of land KISUMU/DAGO/566 and despite a valid Judgment and orders, the 1st Plaintiff has ignored the same and have commenced construction of illegal structures on the suit property.

It is the Applicant's contention that the 1st Plaintiff has continued with farming in the 1st Defendant's parcel of land in total defiance of the court order finds favor with this court.

From the Supporting Affidavit filed, it appears that the 1st Plaintiff continues to use violence to deny the 1st Defendant access to his parcel of land which has led to untold suffering and poor health

The 1st Plaintiff/Respondent in his Replying Affidavit stated that the Application is *sub judice* to application dated 26th October 2020 which was later amended on 10th November 2020. The in the said application, the Applicant herein sought to cite all Respondents for defying court orders and the Applicant has never fixed the Application for Hearing. This court has looked at the Application and confirms that the same was never fixed for Hearing but no prejudice will be suffered by either party when the court determines the instant application.

I have discerned the court order issued by Honourable Lady Justice M.A. Odeny on 1st September 2020, she granted status quo over the suit property and at the time of grant of the orders of status quo the 1st plaintiff and his father had been evicted and therefore using the same order to regain possession is not only contemptuous of the said order but also an abuse of the court process.

From the Pleadings and the evidence on record, this court finds that the Applicant has clearly specified which court order the 1st Plaintiff /Respondent has failed to comply with. The court order referred to by the applicant is dated 1st September 2020 and issued on the same date, made in the presence of parties and sought to maintain the status quo until the ruling in ELC No 13 of 2015 but the respondent took advantage of the order to take possession and develop the land. I do find that the 1st plaintiff is in serious breach and in contempt of the order the court issued pursuant to his application and do order that the 1st plaintiff respondent be jailed for a period of 30 days or in the alternative he pays a fine of Ksh 50,000. (fifty thousand Kenya shillings). Warrants of arrest to issue. Costs of the application to the 1st defendant.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 19TH DAY OF NOVEMBER, 2021

ANTONY OMBWAYO

JUDGE

This Ruling has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15th March 2020.

ANTONY OMBWAYO

JUDGE