



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO. 88 OF 2017

JOEL MOTAROKI OMBOGI.....PLAINTIFF

VERSUS

CHAMI SIMUYU.....1ST DEFENDANT

EMBAKASI RANCHING

COMPANY LIMITED.....2ND DEFENDANT

RULING

1. Coming up for ruling is a Notice of Motion application dated 13th April 2021 by the plaintiff which seeks the following orders:

i. Spent.

ii. Pending the hearing and determination of this Application inter partes the 1st Defendant, by himself, his officers, and/or agents be and is hereby restrained from trespassing and undertaking any activities thereon onto the Suit Property Number G13 (C244), now referred to as Nairobi/ Block 136/ 12441 situate in Ruai, Nairobi.

iii. The Officer Commanding Station (OCS); Ruai Police Station enforces the order in prayer two (2).

iv. Pending the hearing of this Application the court directs the Deputy Registrar to visit the aforementioned property, conduct a site inspection and render the site inspection report to court.

v. The 1st Defendant be and is hereby declared to be in contempt of Court for disobedience of the Court Orders issued on 14th May, 2018 by this Honourable Court.

vi. The Defendant be committed to civil jail for such period as this Honourable Court shall deem necessary for being in disobedience of the said court orders.

vii. The Defendants property be attached for purposes of securing compensation to the Plaintiff as the court may deem fit.

viii. Such other or further orders as may be just be made to meet the ends of and to safeguard and protect the dignity of the Honourable Court; and

ix. Costs of this Application be provided for.

2. This application together with the supporting affidavit dated 13th April 2021 was premised on the grounds that the 1st defendant being well aware of the court orders issued on 14th May 2018 stopping further dealings on the suit property pending hearing and determination of the suit, went ahead and disregarded the orders and continued construction of other structures on the suit property. The plaintiff argued that this disobedience defeats the purpose of the court order and the 1st defendant ought to be punished for contempt.

3. The 1st defendant filed a Notice of Preliminary Objection and a replying affidavit dated 7th May 2021 in which he deponed that prior to commencement of the suit, he had already built a house in which he was occupying with his family, information which the court was aware of. He stated that the fence in the suit land where he resides, had overgrown which resulted to him trimming it for security purposes. The trimming is what the plaintiff was terming as construction. He annexed photographic evidence to show that he had not tampered with the structures or anything else on the suit property as had been ordered by court.

4. He further added that it is the plaintiff who had come to court with unclean hands since he had attempted to process the title documents for the suit property in November 2019 against the court order but the attempt was discovered and stopped.

5. This application was canvassed by way of written submissions.

Plaintiff's submissions

6. The plaintiff filed his submissions dated 13th July 2021 stating that the 1st defendant was in contempt of court for disregarding court orders issued on 14th May 2018 by Justice Eboso. He submitted that the courts in the cases of Carey v Laiken, 2015 SCC 17 (16th April 2015) and Katsuri Limited v Kapurchand Depor Shah [2016] eKLR had expounded on elements that ought to be met for contempt of court to be established. It was further submitted that the court should not condone deliberate violation and undermining of its orders as was held in Samuel M. N. Mweru & Others v National Land Commission & 2 others (2020) eKLR; B v Attorney General (2004) and Mutitika v Baharini Farm Limited (1985) eKLR.

8. In conclusion, it was submitted that the plaintiff stands to suffer great loss and injustice if the 1st defendant persists in his disregard for court orders and would also erode the dignity of the court. That in the circumstances, the 1st defendant should be punished for contempt of court orders.

9. No submissions could be traced for the 1st defendant in the Court Tracking system or in the court file as of 4th November 2021.

Determination

10. The issues for determination are;

i. Whether the defendant is in contempt of court.

ii. If yes to the above, should the 1st defendant be punished for contempt.

iii. Whether restraining orders should be issued against the defendant.

11. The plaintiff states that the 1st defendant is in contempt of court for continuing to construct structures in the suit land. An allegation that the 1st defendant has denied stating that he was trimming the perimeter fence which had overgrown causing insecurity to him and his family.

12. In the case of Christine Wangari Gachege vs. Elizabeth Wanjiru Evans & 11 Others, [2014] Eklr, the court found that the English law on committal for contempt of court ... was applied by virtue of **section 5(1) of the Judicature Act** which provided that:

“The High Court and the Court of Appeal shall have the same power to punish for contempt of court as is for the time being possessed by the High Court of Justice in England, and that power shall extend to upholding the authority and dignity of subordinate courts.”

13. In the case of Samuel M. N. Mweru & Others v National Land Commission & 2 others [2020] eKLR Mativo J. also stated that;

“...The test for when disobedience of a civil order constitutes contempt has come to be stated as whether the breach was committed ‘deliberately and mala fide.’ A deliberate disregard is not enough, since the non-complier may genuinely, albeit mistakenly, believe he/she is entitled to act in the way claimed to constitute the contempt. In such a case good faith avoids the infraction...”

14. This court opines that contempt cases which can be punished by committal to civil jail, as prayed by the applicant, ought to be decided on incontrovertible facts that the contemnor deliberately failed to adhere to court orders. In the case at hand and going by the wise words of Justice Mativo in the foregoing paragraph, this court is not persuaded that the defendant wilfully failed to obey court orders. The 1st defendant stated that he was trimming his fence and annexed photographic evidence of the cut twigs/branches on the suit property. The plaintiff did not refute this argument.

15. It is also not lost to this court that by the time the plaintiff was putting in his initial application of 6.2.2017, there was an already built up house on the suit land. The ruling there of was delivered more than a year later on 9.3.2018. It is most probable that by then the respondent was fully settled in the house. The applicant did not seek orders to ascertain the actual status on the ground when the court delivered a ruling in the year 2018. The applicant cannot turn around three years down the line to urge the court to determine that the respondent is in violation of the court orders.

16. The restraining orders sought in prayer 2 and 3 are the very orders which the applicant had sought in the initial application of 6.2.2017 which orders were declined by the court vide the ruling of 9.3.2018. I need not belabour on this point.

17. In the final analysis, the application dated 13.4.2021 is found to have no merits, the same is dismissed with no orders as to costs. Parties should hasten to prepare for the trial scheduled on 14.2.2022.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 17TH DAY OF NOVEMBER, 2021 THROUGH MICROSOFT

TEAMS.

LUCY N. MBUGUA

JUDGE

In the presence of:-

M/S Moraa holding brief for Mr. Nyamweya for the Plaintiff

Nyoike for the 1st Defendants

Court Assistant: Edel Barasa