



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC CASE NO. 172 OF 2017

CHARLES LAALIA M' LINKAIBUA.....PLAINTIFF/APPLICANT

VERSUS

JOSEPH NTHILITHIA M'AKWALU.....DEFENDANT/ RESPONDENT

AND

ANDREW KAIBUNGA.....CONTEMPTOR

RULING

1. The Applicant herein filed the application dated 19th November 2019 seeking the following Orders;

a. That an Order do issue directing the Ocs Muthara Police Station to ensure compliance of the orders issued by this Court dated 14.1.2019.

b. That the Defendants/Respondents be restrained from interfering with the applicants quiet possession of his portion of land in Tigania/Katharane/130 land from commencing and/or continuing with destruction of the common boundary between Land Parcel Nos. Tigania/Katharane/1301 & 1323 in breach of this Courts Orders dated 14/01/2019.

c. That the Defendant/Respondent be ordered to deposit the sum of Kshs One Hundred Thousand (Kshs 100,000/=) into this Court as security for damage.

2. The application was supported by the sworn Affidavit of **Charles Laalia M' Linkabua** who averred that this honourable court delivered a judgement in his favour on 25/07/2018 to which he extracted an order dated 14/01/2019 and served the same upon the Defendants/Respondents on 2/05/2019.

3. That in compliance with the Court order, the plaintiff instructed a surveyor who dully affixed boundaries in the suit premises, and thereafter, the plaintiff fixed a fence in consonance with the surveyor's beacons. However, the Defendant with his son **Andrew Kaibunga** together with others wielding machetes destroyed the common boundary by causing wanton destruction on the fence hence occasioning a loss of over Kshs 100,000/=. The matter has since been severally reported to the police and Area Chief with no fruitful results. That the Respondents have since fenced off the access road in blatant disregard of the Court orders.

4. The application was served upon the Respondents but they have not filed any response.

Analysis and Determination

5. The plaintiff herein instituted this suit vide a plaint dated 29.5.2017, which depicted a boundary dispute between **Parcel Nos. Tigania/ Kitharene/1301 and 1323**. The suit proceeded ex-parte.

6. The Court directed the surveyor to visit the site thereon and file a report. A report was filed on 9/3/2018 which indicated that the Defendant had encroached on the parcels land. The court therefore delivered a judgment containing the following Orders;

(a) An Order of mandatory injunction be and is hereby issued restraining the defendant from destroying the common boundary between the land parcel No. Tigania/ Kitharene/1301 & 1323 respectively.

(b) An Order be issued for the sub-county surveyor Meru North to fix the actual boundary between the two parcels as per his report dated 9/3/2018.

(c) Plaintiff to meet the surveyor's costs of fixing the boundary.

(d) Defendant is condemned to pay costs of this suit.

7. The applicant herein has attached photos which shows that he constructed a fence which was later destroyed allegedly by the Respondent and one Andrew Kaibunga.

8. The first part of call with respect to the procedure for institution of contempt of Court proceedings in this country is **section 5 of the Judicature Act Cap 8 Laws of Kenya**. Where it is provided that;

I. 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.

II. An order of the High Court made by way of punishment for contempt of court shall be appealable as if it were a conviction and sentence made in the exercise of the ordinary original criminal jurisdiction of the High Court.

9. In **Republic v Kenya School of Law & 2 others Ex parte Juliet Wanjiru Njoroge & 5 others [2015] eKLR, G.V. Odunga** proceeded further to explain the procedure in the forgoing terms;

“The application is made in the proceedings in which the judgement or order was made or undertaking given and the applicant is required to set out fully the grounds on which the committal application is made, identify separately and numerically, each alleged act of contempt and be supported by affidavit(s) containing all the evidence relied upon. The said application and affidavit(s) must be served personally on the respondent unless the Court dispenses with the same if it considers it just to do so or authorises an alternative mode of service.”

10. In **Econet Wireless Kenya Ltd vs. Minister for Information & Communication of Kenya & Another [2005] 1 KLR 828 Ibrahim, J** (as he then was) stated that:

“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, or in respect of whom, an order is made by a Court of competent jurisdiction, to obey it unless and until that 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 an order believes it to be irregular or void”.

11. I have seen the affidavit of service filed on 25.11.2019 which shows that the respondent and the contemtor were served with the application. However, I have taken into account that this is a situation whereby the matter proceeded ex-parte and there is no indication that the Respondents were served with the extracted Court Order. (I have not seen the affidavit of service of the order of 14.1.2019). The contempt of Court Orders cannot therefore take effect without prove that the Orders were served. I am therefore inclined to partially allow the application in the following terms;

1) Prayer 2 , 3 and 5 in the application are allowed.

2) I direct the Respondent and the Contemtor to personally appear before this Court to show cause as to why appropriate sanctions cannot be taken against them as prayed in the application.

3) Respondents are condemned to pay costs of this application.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS 29TH JANUARY, 2020 IN THE PRESENCE OF:-

C/A: Kananu

K. Muriuki holding brief for Mutuma for applicant

HON. LUCY. N. MBUGUA

ELC JUDGE