



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 346 OF 2013

DR. SAMSON K. A. TIM.....PLAINTIFF

VERSUS

GRACE KIMOI BITTOK.....1ST DEFENDANT

COLLINS K. BITTOK.....2ND DEFENDANT

ELVIS K. BITTOK.....3RD DEFENDANT

NELSON O. ODHIAMBO 286.....4TH DEFENDANT

HON. ATTORNEY GENERAL.....5TH DEFENDANT

THOMAS KIPTIM.....6TH DEFENDANT

MATHEW KIPRUTO BITTOK.....7TH DEFENDANT

RULING

1. *Samson K. A. Tim*, the Plaintiff, moved the court through the Notice of Motion dated 20th June, 2019 citing **Section 5 (1) of the Judicature Act Chapter 3 of Laws of Kenya, Order 52 Rule 2(2) of the Rules of the Supreme court of England, Section 13 and 29 of Environment and Land Court Act, Order 40 Rule 3 of Civil Procedure Rules and Section 3A of Civil Procedure Act Chapter 21 Laws of Kenya**, seeking to have *Grace Kimoi Bitok, Elvis Bitok, Thomas Kiptim* and *Mathew Kipruto Bitok*, the 1st, 3rd, 6th and 7th Defendants/Respondents respectively, to be committed to imprisonment for a term that the court deems fit for contempt of court having disobeyed the order issued on the 27th May, 2019 that was duly served upon them. The application is based on the nine (9) grounds on its face marked (1) to (9), and supported by the affidavits sworn by the Plaintiff on the 20th June, 2019 and 18th July, 2019. The Plaintiff's case is that contrary to the court order of the 27th May 2019, the 7th Defendant assisted by the 1st, 3rd and 6th Defendant buried to body of the wife of the 7th Defendant on land parcel *Lembus/Torongo/791*, one of the suit land, that belongs to the Plaintiff on the 1st June, 2019. That the Defendants have obtained a status quo order in Nakuru Succession Cause No. 57 of 2008 and are using it to deny the Plaintiff access to the said land. That upon the court granting the order of 27th May 2019, the same was extracted and served on the 28th May, 2019 at the O.C.P.D.'s office, Eldama Ravine. That the Defendants declined service asking that it be served upon their advocate. That service was effected upon M/s Tarus Advocates on the 29th May, 2019. That the order was on 29th May, 2019 extended to the 17th June, 2019 when the interpartes hearing was to take place. That the Defendants did not attend court and Plaintiff informed the court that they had buried the body on the 1st June, 2019 at night.

2. The application is opposed by the 1st to 3rd Defendants through the Grounds of Opposition dated the 12th June, 2019 summarized as follows:

- (a) That the 6th and 7th Defendants are strangers to this suit as they have not been enjoined, and that the Plaintiff has introduced them without leave.
- (b) That the intended 7th Defendant is the biological son to the Plaintiff and resides on the parcel originally known as Lembus/Torongo/402, and that the Order of 27th May, 2019 was not served upon the 1st to 3rd Defendants.
- (c) That the application dated 27th May, 2019 was to be heard on the 28th May, 2019 and the order of 27th May, 2019 was not extended.

(d) That the order has since been overtaken by events and the application should be dismissed with costs.

3. The application came up for hearing on the 30th January, 2020 and Mr. Odongo Advocate for 4th and 5th Defendants informed the court he will not participate in the hearing of the application as it does not touch on his clients. The other named Defendants were not represented and did not attend court and the Plaintiff sought for the 1st, 3rd, 6th and 7th Defendants to be committed to imprisonment for disobeying the court order of 27th May, 2019 by burying the body on the said land on the night of 1st June, 2019.

4. The issues for determinations by the court are as follows:

(a) Whether the order of 27th May, 2019 was served upon the 1st, 3rd, 6th and 7th Defendants, and if so, when?

(b) Whether the Plaintiff has proved that the body of the late wife to the 7th Defendant was buried on land parcel Lembus/Torongo/791 on the night of 1st June, 2019 and if so, whether that amounted to disobeying the court order of 27th May, 2019.

(c) Whether the order of 27th May, 2019 was in force on the 1st June, 2019.

5. The court has carefully considered the grounds on the Notice of Motion dated the 20th June, 2019, the supporting and supplementary affidavits by the Plaintiff, the grounds of opposition, the record and come to the following findings;

(a) That this suit, Eldoret ELC No. 346 of 2013, was commenced by Samson K. A. Tim as the Plaintiff against Grace Kimoi Bitok, Collins K. Bitok, Elvis K. Bitok, Nelson O. Odhiambo 286 and Hon. Attorney General as the 1st to 5th Defendants through the plaint dated 14th June, 2013 and filed on the 18th June, 2013. The Plaintiff seeks for declaratory and eviction order in respect of Lembus/Torongo/790 to 792, removal of caution, mesne profits and costs. The 1st to 3rd Defendants entered appearance through M/s W. Kigen & Company Advocates vide the Memo dated the 3rd July, 2013. Then vide Notice of Change of Advocate dated 13th March 2014, M/s Komen Kipchirchir & Company Advocates came on record for 1st to 3rd Defendants in place of the earlier Counsel. That M/s Tarus & Company Advocates subsequently filed the Notice of Change of Advocate dated the 17th December, 2014 and is the Counsel now on record for the 1st to 3rd Defendant.

(b) That Senior Deputy Litigation Counsel filed their Memo of Appearance for the Attorney General and hence represents the 4th and 5th Defendants.

(c) That Thomas Kiptim, referred to as the 6th Defendant, appear to have been introduced in these proceedings vide the Application for leave to cite him and others for contempt dated the 21st January, 2016. That the said Thomas was also indicated as the 6th Respondent in the Motion dated 2nd February, 2016 seeking to cite him and others for contempt. The record shows that the application was heard and vide a ruling delivered on the 31st March, 2017, dismissed with no order as to costs.

(d) That Mathew Kipruto Bitok, the intended 7th Defendant, has been brought into this proceedings through the Notice of Motion dated the 27th May, 2019 that seeks to among others enjoin him as the 7th Defendant (prayer 2). The other prayers are for injunction to stop the 7th Defendant from burying the remains of his late wife on Lembus/Torongo/790 to 792. The record shows that the Plaintiff appeared in court on the 27th May, 2019 *ex parte*, and the application was certified urgent and injunction order in terms of prayer 3 granted. The court also directed that the application be served before close of business that day for hearing on the next day, the 28th May, 2019 among other directions.

(e) That the record confirms further that no hearing took place on the 28th May, 2019 as the next court appearance was on the 29th May, 2019 when the application was fixed for 17th June, 2019. That on that date, the Plaintiff was allowed to file the application for contempt and matter placed for mention on the 11th July, 2019 when a further mention of 23rd July, 2019 was fixed. Thereafter, the matter was fixed for hearing of the Notice of Motion dated the 20th June, 2019 on the 16th October, 2019 when it was put off to 20th November, 2019 and then 30th January, 2020 when it was heard.

(f) That from the grounds on the Motion dated the 20th June, 2019 and the affidavit evidence by the Plaintiff, the court finds that after the Order of 27th May 2019 was issued, the same was extracted on the same date. That the 3rd, 6th and 7th Defendants were served with the order before the O.C.P.D., Eldama Ravine on the 28th May, 2019. That even though they declined to acknowledge receipt and asked that service be effected upon their advocate M/s Tarus & Company Advocates, they were apprised of its contents. That the advocate was subsequently served on the 29th May, 2019. That whereas the court agrees with Counsel that there is no evidence of service of the Order upon the 1st and 2nd Defendants, the same cannot be said about the 3rd, 6th and 7th Defendants.

(g) That the 6th and 7th Defendants are in person as no advocate has come on record for them. That M/s Tarus & Company Advocates cannot legally be taken to be their advocates and therefore ground 1 to 3 of the Grounds of Opposition are relations to parties not represented by Counsel.

(h) That the prayer 3 of the Notice of Motion dated 27th May, 2019 that was granted on that same date is to the effect that the 7th Defendant, his agents, relatives or persons under his directions were restrained from **“burying the remains of his wife on the suit land parcel Lembus/Torongo/790, Lembus/Torongo/791, and Lembus/Torongo/792 pending the hearing of this application”**.

That it follows that the order did not require to be extended and is actually still in force as the Motion dated the 27th May, 2019 is yet to be heard.

(i) That the finding in (h) above confirms that the person/party who was restrained from burying the remains of the deceased was the 7th Defendant either by himself, agents, relatives or anybody under his directions. The Plaintiff has clearly deponed that the burial of the 7th Defendant's late wife was buried on Lembus/Torongo/791 by the 7th Defendant on the night of 1st June, 2019. That though he has indicated that 1st, 2nd, 3rd and 6th Defendants participated in the said burial, he has not specifically shown what active role each one of them prayed.

(j) That the court is satisfied that the Plaintiff has established that the intended 7th Defendant disobeyed the court order issued on the 27th May, 2019 and which order was brought to his attention on the 28th May, 2019 at Eldama Ravine's O.C.P.D. office.

6. That flowing from the foregoing, the court finds merit in the Motion dated the 20th June, 2010 and orders as follows;

(a) That Mathew Kipruto Bitok, the intended 7th Defendant, disobeyed the court order of 27th May, 2019 by burying the remains of his late wife on land parcel Lembus/Torongo/791 and is therefore in contempt of court.

(b) That the said intended 7th Defendant is hereby ordered to remove by exhumation the remains of his late wife which he buried on land parcel Lembus/Torongo/791 on the night of 1st June, 2019 within forty-five (45) days under the supervision of the O.C.P.D., Eldama Ravine and the County Public Health Officer. That thereafter this matter be mentioned to confirm compliance of the exhumation order and or further directions or sanctions.

(c) The intended 7th Defendant to meet the Plaintiff's costs of the application.

Orders accordingly.

Dated and delivered at Eldoret this 12th day of February, 2020.

S. M. KIBUNJA

JUDGE

Ruling read in open court in the presence of:

Plaintiff - Present.

Defendants - Absent

Christine: Court Assistant