



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT ELDORET**

**E & L CASE NO. 290 OF 2016 (OS)**

**LUCY JEBET KIPTOO.....PLAINTIFF**

**VERSUS**

**KIPTOO KURUI.....DEFENDANT**

**RULING**

1. **Lucy Jebet Kiptoo**, the Plaintiff seeks vide the Motion dated 18<sup>th</sup> May 2018, to have **Kiptoo Kurui**, the Defendant, be cited for contempt of court and be committed to civil jail for six (6) months; and or be ordered to purge the contempt, on terms the court deems just. The application is based on the five (5) grounds on its face and supported by the affidavit sworn by the Plaintiff on the 18<sup>th</sup> May, 2018 and the undated supplementary affidavit filed on the 16<sup>th</sup> July, 2018. That it is the Plaintiff's case that on the 23<sup>rd</sup> January, 2017 the court ordered in the presence of both parties and consent that there be **"no dealing with the land in any way, pending the hearing and determination of this suit."** That the Defendant has breached that order as he has demarcated, subdivided, leased and or sold portion of **Olainguse/Olainguse Block 1 (Olainguse) 18** to other persons between the months of February, 2018 to April, 2018. That the buyers or investors have since fenced, tiled, planted crops and put up structures on the portions purchased or leased from the Defendant. That the Defendant had used the proceeds of the sale or lease to his personal use and not for the benefits of his children who are suffering and toiling in life.

2. The application is opposed by the Defendant through the replying affidavit sworn by Kiptoo Kirui alias James K. Soy, the Defendant, on the 31<sup>st</sup> May, 2018. That it is the Defendant's case that the order of 23<sup>rd</sup> January, 2018 was never extracted and served upon him. That he resides at Kericho County and had not entered Olainguse/Olainguse Block (Olainguse) 18 as alleged by the Plaintiff. That the last portion he sold was in 2015 and was with the consent of the Plaintiff. That the photographs annexed by the Plaintiff were of 2015 and that they reflect the portion of the land he was using before moving to Kericho in 2015 and before the house he was using was demolished by the Plaintiff and her children on the 27<sup>th</sup> December, 2015. That the Plaintiff is the one who has been using the land.

3. The learned Counsel for the Plaintiff filed their written submissions dated the 16<sup>th</sup> July, 2018. The Counsel submits that the Defendant and his Counsel were in court when the order of 23<sup>rd</sup> January, 2018 was issued and there was therefore no need to extract and serve it upon him. That the Defendant has disobeyed the order and should be punished in accordance with the **Contempt of Court Act No. 6 of 2016**.

4. The learned Counsel for the Defendant also filed their written submissions dated the 18<sup>th</sup> July, 2018. The Counsel submitted that the Defendant was not in court on the 23<sup>rd</sup> January, 2017 when the order was issued. That the order was not extracted and served upon the Defendant personally and even the application was not served upon him, but on his advocate. The counsel referred to the case of **Nyamodi Ochieng Nyamogo & Another Vs Kenya Posts & Telecommunications Corporation – Civil Appeal Nairobi No. 264 of 1993 [1990 – 1994] E.A. 464**, where the learned Judges stated that **"the omission to serve a penal notice is fatal to an application for contempt of court..... mere knowledge of all terms and directions of the court is not enough for the purposes of contempt"**. That the Plaintiff has not annexed copies of the sale agreements or given names of the alleged purchasers. That the digital photos were not admissible as the device used in their printing is not given. That the application is defective as it does not specify the particulars of breach attributed to the Defendant.

5. The following are the issues for the court's determination;

(a) **Whether the Plaintiff has established that the Defendant knew of or was aware of the terms of the injunctive order of 23<sup>rd</sup> January, 2017.**

(b) **Whether the Plaintiff has proved to the standard required that the Defendant had sold and or leased portions of Olainguse/Olainguse Block 1(Olainguse) 18 to third parties, and if so, whether that amounts to a breach or disobedience of the order of 23<sup>rd</sup> January, 2017.**

(c) **Whether the Defendant should be cited for contempt of court and if so, what sanction to issue.**

**(d) Who pays the costs?**

6. The Court has carefully considered the grounds on the Motion, the affidavit evidence by both parties, the written submissions by both Counsel, the record of the court and come to the following findings;

a. That though the Plaintiff has claimed that the Defendant was personally present in court on the 23<sup>rd</sup> January, 2017 when the order he is alleged to have disobeyed was issued, and therefore there was no need to extract the order and serve it upon him, the coram of that day does not support the Plaintiff's position. That the only persons shown to have been present are both Counsel. That it was therefore necessary for the Plaintiff to have had the order extracted and served personally upon the Defendant with a penal notice before founding an application for contempt on it.

b. That noting that the Plaintiff was obligated to tender proof of breach of the order to a standard of above balance of probabilities, and below beyond reasonable doubts, her failure to disclose the names of the person or persons the Defendant had sold or leased portions of the said land to and the absence of documentary evidence in support thereof means her claim is based on allegations that are not established or substantiated.

c. That land parcel ***Olainguse/Olaininguse Block 1 (Olaininguse) 18*** is a registered land, going by the copies of the title deed issued on the 29<sup>th</sup> July, 1996 filed with the parties processes earlier on. That in case there has been subsequent sales or leases to third parties, the Plaintiff could have obtained copies of the green card or certificates of official searches and filed them with the court to establish the same.

d. That the Defendant has denied having entered the said land in the year 2018. That the Plaintiff has not challenged that deposition or tendered proof to show that the Defendant had been on the said land during the period of February to April, 2018 when the alleged breach or disobedience took place.

e. That the foregoing shows that the Plaintiff has failed to prove that the Defendant knew or was aware of the order of 23<sup>rd</sup> January, 2017 and that he has disobeyed it as alleged. That the Defendant's deposition that the contempt application was not personally served upon him has not been disputed by the Plaintiff.

f. That in view of the findings above, the Plaintiff's Motion dated 18<sup>th</sup> May, 2018 is without merit and is dismissed with costs.

Orders accordingly.

**Dated and delivered at Eldoret this 5<sup>th</sup> day of February, 2020.**

**S. M. KIBUNJA**

**JUDGE**

Ruling read in open court in the presence of:

Chemayu for Plaintiff.

M/s Jepkemboi for Defendant.

Christine: Court Assistant