



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO 261 OF 2017

JOHNSON KIPMUTAI CHERUIYOT.....PLAINTIFF

VERSUS

OLIVER KIPMUTAI.....1ST DEFENDANT

PAULINE CHERONO KARIA.....2ND DEFENDANT

JOSEPHAT KIMORIA KARIA.....3RD DEFENDANT

HEZEKIAH KOECH CHERIRO.....4TH DEFENDANT

ROBERT RONO.....5TH DEFENDANT

RULING

1. Before me for determination is the plaintiff's Notice of Motion dated 31st October 2019 brought under Order 40 Rule 3 of the Civil Procedure Rules and Sections 3 and 3A of the Civil Procedure Act. The Applicant prayed for the following orders.

- 1. That the application be certified urgent and be heard on priority basis.*
- 2. That this honorable court be pleased to punish the 4th defendant herein by detaining him in jail for a term not exceeding six months for contempt of court and disobeying order issued on 18th June 2018.*
- 3. That this honorable court be pleased to make such further orders as is just in the circumstances.*
- 4. That the cost of the application be borne by the defendant/respondent herein.*

2. The application was supported on the grounds on the face of the application and on the affidavit sworn in support of the application by the plaintiff. The application was predicated on the grounds that the 4th defendant had disobeyed the Court order issued by the Court on 18th June 2018 barring the Respondents from constructing on land parcels **Nakuru/Nessuit/Settlement Scheme/1998** and **1999**. The applicant averred that the 4th Defendant was served with the Court order but has in defiance and in disobedience of the order continued to construct on the suit property. The applicant contends the 4th defendant is in contempt of the Court and that his acts of disobedience of the Court order will erode the authority of the Court and bring the Court in dispute. The applicant urges the Court to hold the 4th defendant to be in contempt and to punish him in order to uphold the dignity of the Court.

3. The 4th defendant in response to the plaintiff/applicant's application vide a replying affidavit sworn on 18th November 2019 admitted they were served with the Court order issued on 18th June 2018 which restrained them from carrying on any further construction on the suit property. The 4th defendant averred that he had been residing on the suit property since 2012 with his family. He denied that he had disobeyed the Court order of 18th June 2018 stating that what had been put up was a temporary structure which did not in any manner alter or affect the status quo of the suit properties.

4. The applicant annexed as 'HK3' a picture of the alleged structure(s). The 4th Respondent averred that the application was not brought in good faith and was merely intended to harass and intimidate him since he was residing on the property and the plaintiff would like to get him out of the land. The 4th defendant contended that as he was residing on the suit land, the order could not be interpreted to mean he could not

engage in any activities on the land for his wellbeing pending the determination of the suit.

5. The plaintiff /applicant filed written submissions to canvass the application. The 4th defendant did not file any submissions and stated he would rely on his replying affidavit on record. In his submissions the applicant submitted that obedience of Court orders was not discretionary but was indeed mandatory and paramount in the administration of justice. The applicant placed reliance in the case of ***Shimmers Plaza Limited – vs- National Bank of Kenya Ltd (2015) eKLR*** where the Court stated thus:-

“---it cannot be gainsaid that the duty to obey the law by all individuals and institutions is paramount in the maintenance of the rule of Law, good order and the due administration of justice”.

6. The applicant submitted the 4th defendant was served with the court order of 18th June 2018 and he was aware of the terms and content of the order which were clear and not ambiguous yet he chose to disobey the same. He contended that the 4th Respondent has willfully and deliberately chosen to disobey the order and urged the court to hold him to be in contempt and to accordingly punish him.

7. The order of 18th June 2018 which is the subject of the instant contempt proceedings was issued by Munyao, J exparte on 14th June 2018 in regard to the application for injunction by the plaintiff/applicant dated 12th June 2018. The exparte order was issued pending the hearing of the application interpartes on 27th June 2018. On 27th June 2018 the application was not heard and was adjourned for hearing on 1st October 2018. Again on 1st October 2018 the application was not heard and was rescheduled for hearing on 16th October 2018. On 16th October 2018 the application was again stood over for hearing on 20th November 2018. The court record shows that the plaintiff/applicant did not attend court and the defendants were present and were represented by Mr. RM Onyancha advocate.

8. In the absence of the plaintiff the defendants applied for the plaintiff's application dated 12th June 2018 to be dismissed. The court accordingly ordered the plaintiff's application dated 12th June 2018 dismissed with costs. The record does not show the application was subsequently reinstated. The effect of the court's order dismissing the plaintiff's application dated 12th June 2018 was that any interim orders that were granted pending the hearing of the application stood vacated as they could only have been confirmed if the application had been heard and allowed.

9. In effect therefore the court order the 4th defendant is alleged to have disobeyed was not in existence at the time the application for contempt was filed. The order stood vacated and discharged on 20th November 2018 when the plaintiff's application dated 12th June 2018 was ordered dismissed on account of non-attendance on the part of the plaintiff/applicant. One cannot be in contempt of a non-existent order. The plaintiff's application is without any merit and it is an abuse of the court process and the same is ordered dismissed with costs to the 4th defendant.

10. Orders accordingly.

Ruling dated signed and delivered electronically at Nakuru this 30th day of April 2020.

J M MUTUNGI

JUDGE