REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

ENVIRONMENT & LAND CASE NO.83 OF 2012

TOM L. WANAMBISI.....PLAINTIFF

VERSUS

DICKSON W. BABANDEGE.....1ST DEFENDANT

AGRICULTURAL FINANCE CORPORATION.....2ND DEFENDANT

PAUL M. OKECH T/A PAMBO INVESTMENTS...3RD DEFENDANT

RULING

This suit was filed on 19th October 2012 and it is unfortunate that six(6) years down the line, this Court is being called upon to determine an application dated 20th February 2018 and filed under Certificate of Urgency. Parties to Civil proceedings have a duty to assist the Courts achieve the overriding objectives of the Civil Procedure Act and the rules made thereunder which is the just, expeditious, proportionate and affordable resolution of disputes. In order to do so, the Courts must dispose of proceedings timely. The parties in this case have clearly not assisted the Court in that regard.

Sample this. After this suit was filed on 19th October 2012, **OMOLLO J** granted the Plaintiff a temporary injunction restraining the 1st defendant, his servants or agents from trespassing, taking possession, destroying any property or interfering with land parcels No. **NDIVISI/MAKUSELWA/89** and **NDIVISI MAKUSELWA/90** pending the hearing inter-parte of an application for injunction pending trial which was dated 25th October 2012. In granting that exparte order, **OMOLLO J** also made the following direction:

> ***"The Applicant to serve the defence with the suit papers before hearing date together with this order and hearing notice".***

It is not clear whether this direction as complied with. What is clear however is that it was not until 27th July 2016 that the 1st defendant filed his defence and counter-claim.

Meanwhile, by a ruling dated 29th August 2013, **OMOLLO J** dismissed with costs that application by the plaintiff following an inter-parte hearing. Ideally, the parties ought to have moved on to prepare this suit for trial by complying with the pre-trial directions. That did not happen.

It was now the turn of the 1st defendant to file his own application dated 27th July 2016 seeking the main order that the plaintiff by himself, his agents, workers, servants and whomsoever claiming through him be restrained from entering, occupying, trespassing and or in any manner interfering with the defendant's use, occupation and access to land parcel No. **NDIVISI/MAKUSELWA/89** pending hearing and determination of this suit. That application was placed before **MUKUNYA J** who granted it by a ruling dated 3rd October 2017. The Judge also made the following directions:

> ***"The parties are advised to fast track the suit so that the pending issues can be determined"***

Again the parties went to sleep. From the record, there is nothing to show that any attempt has been made to comply with the provisions of order 11 Civil Procedure Rules. I now have before me for determination, the1st defendant's Notice of Motion dated 20th February 2018 predicated under the provisions of Section 3A of the Civil Procedure Act and Order 40 Rule 3 of the Civil Procedure Rules seeking the following orders:

(a) Spent

(b) That TOM LIRHU WANAMBISI the plaintiff in this case be committed to Civil jail for a term of six months for being in

contempt of Court for having deliberately disobeyed orders of this Honourable Court issued on 30th November 2017.

(c) Any other or further orders of the Court geared towards protecting the dignity and authority of the Court.

(d) Costs of this application be provided for.

The application is premised on the grounds set out thereon and is also supported by the affidavit of the 1st defendant **DICKSON W. BABANDEGE**. The gravamen of the said application is that on 30th November 2017 this Court issues an order restraining the plaintiff by himself, his agents, workers, servants and whosoever claiming through him from entering, occupying, trespassing and or in any manner interfering with his use, occupation and access to land parcel No. **NDIVISI/MAKUSELWA/89** pending the hearing and determination of this suit. That order was duly served upon the plaintiff on 21st December 2017 by the Court process server named **CHARLES SIFUNA OTUNGA**. However, when the 1st defendant took workers to the land in January 2018 to fence it and prepare it for the planting season, the plaintiff chased them away. That attempts even by the local administration to request the plaintiff to obey the order fell on deaf ears yet the orders are clear and unambiguous and bear a penal notice. That the conduct of the plaintiff is demeaning and contempt of Court for which the plaintiff should be punished. Annexed to the application is the sent order issued on 30th November 2017 and the affidavit of service on **CHARLES SIFUNA OTUNGA** dated 21st December 2017 – annextures DW1 and DW2.

The application is opposed and the plaintiff filed a replying affidavit dated 3rd April 2018 in which he averred that the application is misconceived and fatally defective since contempt of Court proceedings are quasi-judicial and must strictly comply to the rules governing them and cannot be cured either by the oxygen rules or Article 159 of the Constitution. That before applying for contempt orders, the Applicant must show the following:

(a) An order capable of being obeyed and/or disobeyed.

(b) That the alleged contemnor has knowledge of the said order.

(c) That there has been breach.

That the order issued on 8th November 2017 was never served on him or his Counsel and the said order restrains him from entering into the suit land of which he has and it is the 1st defendant who is trying to evict him. That the Court cannot issue a mandatory injunctive order at interlocutory stage. That time does not run between 21st December and 13th January and so the affidavit of service by **CHARLES SIFUNA OTUNGA** dated 21st December 2017 is in breach of the provision of Order 50 Rule 4 of the Civil Procedure Rules. That the application has been brought under the wrong provision of the law being Order 40 Civil Procedure Rules which deals with interlocutory injunctive orders and he has not disobeyed the orders as no evidence has been tendered in Court. That the standard of proof in contempt proceedings in much higher and has not been met.

In a further affidavit dated 9th April, 2018, the 1st defendant deponed that the application has met the threshold for granting the order sought and both the plaintiff and his advocate knew about the order which are clear and unambiguous and have never been reviewed, appealed or set aside and the plaintiff cannot challenge the wisdom of the Court in granting the said orders.

The application has been canvassed by way of written submission which have been filed both by **MR. MILIMO ADVOCATE** for the 1st defendant and **MR. GICHERU** for the plaintiff.

I have considered the plaintiff's Notice of Motion dated 20th February 2018 and filed herein on 21st February 2018, the rival affidavits and annextures as well as the submissions by Counsel.

I have first grappled with whether I have jurisdiction to handle this matter in view of the recent decision by the Court of Appeal in **CO-OPERATIVE BANK OF KENYA LTD V. PATRICK KANGETHE NJUGUNA & OTHERS C.A. CIVIL APPEAL NO.83 OF 2016** where the Court of Appeal stated that the jurisdiction of this Court does not extend to disputes relating to ***"mortgages, charges, collection of does and rents which fell within the Civil jurisdiction of the High Court."***

I had to be clear on the issue of jurisdiction because the 2nd and 3rd defendants are the Agricultural Finance Corporation and Pambo Investments respectively who, from the documents filed herein, appear to have sold the land parcel No. **NDIVISI/MAKUSELWA/89** (the suit land) to the 1st defendant through a public auction on 16th April 2010 after the plaintiff who had charged it was un-able to service a loan for which he had offered the suit land as collateral. From the plaint filed herein on 19th October 2012 however, the plaintiff's claim is that the said sale was unlawful illegal null and void and should be cancelled and that the 1st defendant's entry onto the suit land amounts to trespass for which he claims a sum of Ksh.5,203,550 being the value of his properties damaged during the said trespass. The dominant issue here is really trespass to the suit land and not the issue of settlement of amounts owing to any of the parties herein which was the issue in the **CO-OPERATIVE BANK OF KENYA V. PATRICK KANGETHE NJUGUNA** case (supra). I therefore take the view that I have the requisite jurisdiction to determine this suit and the application now before me. The issue of this Court's jurisdiction to determine this dispute and therefore the application dated 20th February 2018 was never raised by the parties but I thought it prudent to put it out of the way first because an issue of jurisdiction can even be raised by the Court on its own motion.

Having said so, the issue for my determination in this application is fairly simple and straightforward. It is whether the plaintiff has disobeyed the order of this Court issued on 30th November 2017 (and not on 8th November 2017 as the plaintiff has wrongly deponed in paragraph 6 of his replying affidavit).

The order was extracted following the ruling by **MUKUNYA J** delivered on 3rd October 2017 and reads as follows:

> ***"That an order do and is hereby issued restraining the plaintiff by himself, his agents, workers, servants and whosoever claiming through him from entering, occupying, trespassing or in any manner interfering with the defendant's use, occupation and access to land parcel No. NDIVISI/MAKUSELWA/89 pending hearing and determination of this suit".***

Contrary to the submissions by **MR. GICHERU** that there was no order capable of being obeyed or disobeyed, the above order is very clear and unambiguous. And if the plaintiff did not comprehend it, the easiest thing to do was to return to Court and seek an interpretation from the Judge who issued it. This application has been brought under the provisions of Section 3A of the Civil Procedure Act and Order 40 Rule 3 of the Civil Procedure Rules. It is not grounded on the provisions of Article 159 of the Constitution or the oxygen rules as averred in paragraph 4 of the plaintiff's replying affidavit. Section 3A of the Civil Procedure Act grants the Court inherent jurisdiction to make such orders as are necessary for the ends of justice or to prevent the abuse of the process of the Court. Order 40 Rule 3 of the Civil Procedure Rules on the other hand provides for the punishment in case of disobedience of interlocutory orders. It reads as follows in sub rule 1

> ***"In case of disobedience, or of breach of any such terms, the Court granting an injunction may order the property of the person guilty of such disobedience or breach to be attached, and may also order such person to be detained in prison for a term not exceeding six months unless in the meantime the Court directs his release"***

It is clear therefore that once a Court grants an interlocutory injunction pending trial, it retains the power to punish a party that disobeys that order. The order issued on 30th November 2017 was not only clear and un-ambiguous but also had a penal notice in the following terms:

> ***"This is a valid Court order and any party who is served with the same and who disobeys it shall be guilty of contempt and liable to a fine and or imprisonment to a term not exceeding 6 months."***

The next issue is whether the order was served on the plaintiff. In disputing service upon him, the plaintiff has deponed in paragraph 10 of the replying affidavit that time does not run between 21st December and 13th January and so the service by **CHARLES SIFUNA OTUNGA** which states that he was served on 21st December 2017 is in breach of the law and the service is improper. His Counsel has submitted, citing the case of **OCHINO & ANOTHER V OKOMBO & OTHERS 1989 KLR**, that there was no personal service of the order upon the plaintiff nor evidence that he signed it.

With regard to the submission that time does not run between the period 21st December of any year and the 13th January of the following year as provided under Order 50 Rule 4 of the Civil Procedure Rules, that provision does not prohibit the serving of any Court process during that period. It only provides that where computation of time for purposes of doing any act, that period shall be omitted. Therefore, there is nothing in law to prohibit the serving of any Court process even during Christmas.

However, for purposes of computing time within which the doing of any act is concerned, the Court will omit the period between 21st December and 13th January.

The order issued by the Court on 30th November 2017 was to be complied with until the suit was heard and determined including during the period referred to in Order 50 Rule 4 of the Civil Procedure Rules.

Was the order issued on 30th November 2017 served on the plaintiff? In paragraph 6 of his replying affidavit, the plaintiff has deponed that the order issued on 30th November 2017 was not served on him. His advocate has submitted, citing the case of **SAM NYAMWEYA V KENYA PREMIER LEAGUE LIMITED & OTHERS 2015 eKLR**, that there was no proper service of the order on the plaintiff and that such service must be personal. The process serves **CHARLES SIFUNA OTUNGA** who is an advocate of this Court and competent to serve processes of the Court has deponed in paragraph 3 of this affidavit of service dated 21st December 2017 as follows:

> ***"That on the same 21st December 2017, in the company of the 1st defendant herein, I travelled to MAKUSELWA Trading Center in MISIKHU then proceeded to the home of the Plaintiff herein situated at MAKUSELWA village. On arrival and from a distance, the 1st defendant pointed out to me a lady standing outside the house and told me she was the wife of the plaintiff herein. I approached the said lady who welcomed me and after a brief conversation with her and upon enquiry from her on the whereabouts of the plaintiff herein, she identified herself as MRS. PENINAH WANAMBISI admitting being the wife of the plaintiff herein and informed me that the plaintiff herein and informed me that the plaintiff was away in Eldoret attending a seminar and will be back the following day but added that she had instructions to accept service on his behalf after talking with the plaintiff on phone and explained to him the purpose of my visit. I therefore served her with the aforesaid documents accepting service at 9.37a.m. by signing at the foot of the return copy now before his Honourable Court duly served."*** Emphasis mine.

It is no longer the law that service of the Court order must be personal before one can be cited for contempt for disobeying it. It is enough if the party had knowledge of the same – **JUSTUS KARIUKI MATE V HON. MARTIN WAMBORA CIVIL APPEAL NO.24 OF 2014**. See also **BASIL CRITICOS V. AG. 2012 eKLR** where **LENAOLA J** (as he then was) held

> ***"… the law has changed and as it stands today knowledge supersedes personal service… where a party clearly acts and shows that he had knowledge of a Court order. The strict requirement that personal service must be proved is rendered unnecessary."***

It is not in doubt that the plaintiff was not at his home on 21st December 2017 and therefore there was no personal service of the Court order

upon him. The question then is whether he knew about the order. I have no hesitation in making a finding that he had knowledge of the order issued on 30th November 2017. Apart from denying personal service upon him, which is not disputed, there is nothing to suggest that he does not live in **MAKOSELWA VILLAGE** or that **MRS. PENINAH WANAMBISI** is not his wife and neither did she have his authority to accept service of the order on his behalf. Indeed, if any of the averments by the process server are incorrect, nothing would have been easier than for the plaintiff to request the Court to summon the process server for cross-examination.

The process server's affidavit is, in my view, quiet exhaustive on how the service was effected upon the plaintiff's wife on his directions. The process server also talked to the plaintiff on the phone and explained the purpose of his visit. The plaintiff's wife also said she had instructions to accept service of the order on his behalf. It cannot therefore be in doubt that the plaintiff had knowledge of the order. Not only did the process server explain to him the purpose of his visit but also, having instructed his wife to receive the order, he had notice of the same and cannot therefore hide behind the fact that there was no personal service. The term **NOTICE** is defined in **BLACK'S LAW DICTIONARY 10TH EDITION** as follows:

> ***"A person has notice of a fact or condition if that person(1) has actual knowledge of it; (2) has received information about it; (3) has reason to know about it; (4) knows about a related fact; or (5) is considered as having been able to ascertain it by checking an official filing or recording."***

The term **KNOWLEDGE** on the other hand is defined as:

> ***"An awareness or understanding of a fact or circumstance; a state of mind in which a person has no substantial doubt about the existence of a fact."***

Given the circumstances in this case, the plaintiff cannot freign ignorance of the order or its contents having expressly authorized his wife to receive it and having also spoken to the process server about it.

The plaintiff then goes on challenge the validity of the order issued by **MUKUNYA J** by stating that the Judge should not have granted a mandatory injunctive order at the interlocutory stage (paragraph 9 of his replying affidavit). It is too late to challenge that order now and once he became aware about it, it was his plain and unqualified obligation to obey it unless it was discharged – **HADKINSON V. HADKINSON 1952 2 ALL ER 567**.

Finally, did the plaintiff disobey or breach the Court order issued on 30th November 2017? The 1st defendant has deponed to how the plaintiff chased him and his workers when he went to the suit land in January 2018 to fence it and prepare it for the planting season. That averment has not really been rebutted by the plaintiff. Indeed the plaintiff's case, as per paragraph 7 of his replying affidavit, appears to be that he cannot be injuncted from entering his land. This is what he has stated:

> **7:** ***"That the said order seeks to restrain me from among others things entering into the suit land – of which I have. Paragraph 5 of the 1st defendant's defence confirms that he is attempting to evict me."***

The plaintiff is therefore justifying his breach of the order by claiming that the suit land is his and he cannot be evicted therefrom.

And in paragraph 9 of the same affidavit he has deponed as follows:

> **9:** ***"That I am advised that the Court cannot or should not grant mandatory injunctive orders at the interlocutory stage"***

MUKUNYA J must have considered all the facts of this case before he issued the order of injunction subject of this application. It cannot be disobeyed on the basis that it should not have been granted in the first place – see **HADKINSON** (supra). The order having been issued by a competent Court, the plaintiff was obliged to obey it or apply to have it set aside or even appeal the ruling of **MUKUNYA J.** To disobey it was not an option. This Court is satisfied from the available evidence that the plaintiff disobeyed the order issued on 30th November 2017 when he chased away the 1st defendant and his workers from the suit land in January 2018 when they went to fence it and prepare it for the planting season.

The up-shot of the above is that the 1st defendant has proved that there has been a disobedience or breach of the Court order issued on 30th November 2017 as provided in Order 40 Rule 3(1) of the Civil Procedure Rules.

The 1st defendant's Notice of Motion dated 20th February 2018 is therefore allowed as prayed. The costs thereof shall be borne by the plaintiff.

I further direct that the plaintiff be served with summons to appear before this Court on 4th October 2018 for further orders.

BOAZ N. OLAO

JUDGE

20TH SEPTEMBER 2018

Ruling dated, delivered and signed in open Court at Bungoma this 20th September 2018.

Mr. Milimo for 1st defendant present

Mr. Gicheru for Plaintiff absent

BOAZ N. OLAO

JUDGE

20TH SEPTEMBER 2018