



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUSIA

CIVIL CASE NO. 46 OF 2015

ROPHINA IMO AMAL.....PLAINTIFF/APPLICANT

= VERSUS =

LAWRENCE ISOGOL KARANI.....DEFENDANT/RESPONDENT

R U L I N G

1. The notice of motion dated 22nd November 2019 is premised under the provisions of Section 1, 1A, 1B, 3, 3A and 63(e) of the Civil Procedure Act and Order 40 and 51 of the Civil Procedure Rules. The plaintiff/applicant seeks orders;

1) Spent

2) That the Defendant/Respondent herein LAWRENCE ISOGOL KARANI be cited for contempt for refusing to obey this Honourable court's order of injunction dated 24/7/2019 stopping him, his workers, agents, or any other person claiming through him from cultivating, planting on, fencing off, ploughing or in any manner whatsoever interfering with L.R No. SOUTH TESO/AMUKURA/2570 pending the hearing and determination of this suit.

3) That should this court cite him for such contempt, he be committed to Civil jail for a period of 6 months and or be fined Kshs.200,000/= and or any other such suitable punishment this court may impose towards disobedience of such court order.

4) That the defendant/respondent be denied audience until and or unless he purges the contempt and or deposits in court the sum of Kshs.150,000/= as costs for loss of user.

5) That costs of this application be borne by the defendant/respondent.

2. The application is grounded upon the following;

a) That pursuant to the extracted order of the court, the Defendant/Respondent was duly served on the 27/7/2019 and on the 28/09/2019 respectively.

b) That despite such service and knowledge of an existing order, the said Defendant/Respondent has filed the same and continued to put the suit parcel into his own personal use by planting thereon maize crop.

c) That the Defendant/Respondent ought to be denied audience by the court until he purges the contempt herein.

d) That court orders are not made in vain and it is procedural in law that the defiance of court order has its consequence.

3. In the affidavit in support of the application, Ms Amai deposed that the court issued an order on 24/7/2019 against the Respondent restraining him from planting, fencing or cultivating L.R No. South Teso/Amukura/257 pending determination of the suit. That the order was extracted and served on the Respondent on 27/7/2019 and 28/9/2019 as shown in the affidavit of service annexed as **RIA2**.

4. The applicant deposed further that inspite of being served with the order, the Respondent defied it and continued to put the parcel into his own use by planting thereon maize crop as shown in the pictures annexed as **RIA 3(a) – (c)**. Consequently the Respondent should be punished for the disobedience and denied audience by court until he purges the contempt.

5. The Respondent filed his replying affidavit on 10th March 2020 in opposition to the application. He deposed that he purchased the suit land from the defendant's father and he has been in exclusive use and occupation. That 22 years down the line, the applicant filed this suit and in paragraph 2 of the supporting affidavit the applicant alleged that he fraudulently sub-divided L.R No. South Teso/Amukura/1127

creating 3 titles. That he opposed the application dated 24/6/2010 which was subsequently withdrawn. That when the new application dated 10/7/2019 was fixed for hearing on 24/7/2019, Mr. Bogonko advocate held the Respondent's advocate's brief.

6. The Respondent denied that he was served with the order. That he should not be cited for contempt for using his land as he is the title holder. That the applicant is using short-cuts to frustrate him and that no basis has been shown upon which he should be punished by paying Kshs.200,000 or to deposit Kshs.150,000 apart from the fact that she is actuated by malice and vindictive. That if he is convicted for contempt, he will suffer irreparable and unmitigatable loss and damage on the following grounds;

(a) *He will be rendered destitute for being denied use of his legally acquired and legally registered land.*

(b) *He will be sentenced to jail for an order that was not served upon him and for exercising his constitutional rights.*

(c) *His family and he will be denied their livelihood over land which is theirs to utilize.*

(d) *The applicant is not the registered proprietor of the land in question and she cannot use a figment of her imagination on unsubstantiated fraud to punish him.*

(e) *The applicant is putting the cart before the horse because the imagined fraud has not been proved; or, to put it more succinctly, will never be proved.*

7. The parties argued the application by way of filing written submissions. The applicant filed hers on 5th March 2020 and the Respondent's was filed on 10th March 2020. The applicant states that the order was made by consent hence the respondent was aware of the same. That this is confirmed by the respondent's application dated 5/12/2019 seeking to set aside the order of injunction. The applicant submitted that the respondent has disobeyed the order as shown in the annexed photographs. She cited the following decisions in support of her application;

(a) *HCCC No. 111 of 2016 Cecil Miller Vs Jackson Njeru and Another at page 4*, where Judge L. Njuguna quoting the holding in the *Case of Econet Wireless Kenya Limited Vs Minister for Information and Communication of Kenya and Another* as follows:-

“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 contemnor. It is the plain and unqualified obligation of every person against or in respect of whom, an 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”.

Justice L. Njuguna stated thus:

“This Court therefore finds the 1st defendant/respondent guilty of contempt and I convict him accordingly. I decline to grant prayer 3 of the application

(b) *Nairobi HC Milimani Law Courts Civil Case No. 242 of 2013 Africa Management Communication International Limited Vs Joseph Mathenge Mugo and Another*, Justice A. Mabeya held:

30. “Finally, since the event has been planned on the background of a breach of the injunctive order of 13th June 2013, allowing the same to continue would be to sanction a contempt of court. That won't do. I am therefore satisfied that sufficient ground for the grant of the temporary injunction has been laid ...

31. “The upshot of this is that the plaintiff Is hereby allowed I find that the 1st defendant to be guilty of contempt of court of the order made on 13/6/2013 He is hereby committed to jail for 30 days effective immediately ...”

8. The Respondent on his part submitted that he was not served with the order and secondly his conduct if any was not deliberate. The respondent submitted that the affidavits of service relied on by the applicant does not show personal service. It is the respondent's contention that he had no knowledge of the order. That proof of contempt is on strict liability and he cited the *Case of Katsure Limited Vs Kapurchand Depar Shah (2016) eKLR*. That under Rule 81.4 of England, the application notice must identify separately and numerically each act of contempt alleged and in this case, the present application has failed this requirement.

9. The respondent further submitted that there is no nexus between the pictures of crops marked *RIA 3(a) and (b)* and the land in question. That in the alternative, it was not proved that the Respondent had knowledge of the order at the time the crops were planted. He relied on the holding in the *South African Case of Kristen Caria Burchell Vs Barry Grant Burchell E. Cape Division Case No. 364 of 2005* thus;

“In order to succeed in civil contempt proceedings, the applicant has to prove (i) the terms of the order (ii) knowledge of this terms by the respondent, (iii) failure by the respondent to comply with the terms of the order. Upon proof of these requirements the presence of willfulness and bad faith on the part of the respondent would normally be inferred, but the respondent could rebut this inference to the contrary on a balance of probabilities”.

10. It is trite law that before a person is punished for contempt, it must be proved that;

(i) *He was aware of/had knowledge of the order.*

(ii) The order must be clear and precise so as to leave no doubt on what a party was supposed to do/refrain from doing.

(iii) There has been proof of disobedience the alleged order.

11. In the instant application, the respondent has taken issue of knowledge of the order and secondly that there has been disobedience. It is therefore incumbent for the applicant to prove that the three tenets have been laid out. To begin with on the issue of knowledge, the applicant stated the respondent was represented when the order was made. Further that the order was also extracted and served upon the respondent.

12. From the court record, on the date the order was made, Mr. Bogonko advocate held brief for the respondent's counsel. Thus there was representation for the respondent when the order was made. Whether the instructions issued by Mr Bogonko on behalf of the Respondent were not within his mandate is not for determination in the contempt application. In the Case of ***Simmers Plaza Ltd Vs National Bank of Kenya Limited (2015) eKLR*** it was held that where a party was represented when the orders are made, personal service was not necessary to be effected on the contemptnor. The applicant was thus under no obligation to serve the order on the respondent. However, the applicant still went further to effect personal service on the respondent as shown in the affidavit filed by the process server.

13. The defendant took issue with the service effected on 27/7/2019 which had at paragraph 5 of the process server's affidavit stating thus;

“5. That I personally served him with copies of the aforementioned documents whereof he accepted service but declined to sign on my copy of an Order that I return to this Honourable court duly served”.

This Court took note of that deposition together with what is deposed at paragraphs 2 & 3 of the same affidavit thus:

“2. That on 27th July 2019, I received copies of an Order dated 24/7/2019 from Ashioya & Co. Advocates with instructions to serve upon the Defendant herein LAWRENCE ISOGOL KARANI.

3. That on the same day, I proceeded to Amukura Mission, South Teso Sub County within Busia County where the home of the Defendant is situated with the sole purpose of effecting service”.

14. The respondent has not denied the description of the location of his home given in paragraph 3 of the process server's affidavit. The process server clearly stated **what he was serving** in his paragraph 2 of the affidavit. The respondent did not request to cross-examine the process server who deposed that the home of the defendant was known to him as he had previously served him with previous pleadings in this matter. Consequently, it is this Court's determination that the respondent was aware of the order **by virtue of his representation in court as well as personal service having been done.**

15. The second issue is to determine whether or not the applicant has proved that there was disobedience of the impugned order. The order extracted and served read as follows;

“That this Honourable Court has issued an Order of injunction against the Defendant/Respondent, their servants, workers, agents, or any other person claiming through them from cultivating, planting on, fencing off, ploughing or in any manner whatsoever interfering with L.R No. South Teso/Amukura/2570 pending the hearing and determination of this suit”.

16. The applicant annexed photographs showing some crops which she stated are on the suit land and which she pleaded constitutes the action of disobedience complained of. The respondent countered that there was no nexus between the crops and the suit land nor dates when they were planted. Proof of contempt is required to be on a standard beyond the balance of probabilities as it is quasi-criminal. I have perused the affidavit in support of the application dated 10th July 2019 and the annexures thereto. In the application for injunctive orders, what was annexed was mutation map for L.R South Teso/Amukura/1127. In paragraph 3 of the same affidavit, it is deposed by the applicant **“that the defendant despite the existence of this suit has continued to put it into his own personal use and is preparing the same for planting this season”.**

17. The Order issued on 24/7/2019 was to restrain the respondent from doing the following on the suit land;

(a) Cultivating

(b) Planting

(c) Fencing off

(d) Ploughing

18. The applicant in the present motion deposed at paragraph 4 of her supporting affidavit that the Respondent has put the suit land into his personal use by planting maize crop thereon. At the time the application seeking orders of injunction was filed, it was intimated that the respondent was preparing the land for planting. I have observed that the photograph marked **RIA 3(a)** shows grown maize at the level above knee length. Photograph **3(b)** is unclear what plants they are and the applicant did not identify them to court. Photograph **3(c)** on the face of it looks like stocks of harvested maize.

19. The applicant did not plead evidence on the age of the maize in **3(a)** i.e. when they were likely to have been planted. The photographs are undated so in the absence of evidence when the planting was done, this court is unable to conclude that the same was done prior to or after

the order was issued. Similarly, annexure 3(c) are dry stocks of maize. The photo is undated so the Court cannot relate it to the matters complained of.

20. Before this Court can punish the respondent for contempt the burden was upon the applicant to prove that there is disobedience. In this instance, the status of the land before the order was served was not given neither the dates when the actual acts of disobedience if at all was committed. The respondent submitted that there was no nexus given of the photographs and the suit land. Although this line of submission may be uncalled for, the fact that the applicant did not specify when the acts of disobedience complained of were committed, it leaves the court no choice but to find that the burden has not been discharged. The burden proof does not shift to the respondent merely because he has deposed that he cannot be stopped from using the suit land being a registered owner. The applicant was obligated to prove throughout that post the issuance of the injunctive order, the respondent continued to cultivate or plough or plant on the suit land.

21. In light of the foregoing, it is my conclusion that the application dated 22/11/2019 lacks merit and hereby dismissed with costs.

Dated, signed and delivered at BUSIA this 18th day of June, 2020.

A. OMOLLO

JUDGE