



REPUBLIC OF KENYA

IN THE ENVIRONMENT COURT OF KENYA AT ELDORET

E & L NO 018 OF 2020

IN THE MATTER OF THE MARRIED WOMEN'S PROPERTY ACT SECTION 17

AND

IN THE MATTER OF ARTICLE 45 (3) OF THE CONSTITUTION 2010

AND

AND IN THE MATTER OF SECTION 93 (1) OF THE LAND REGISTRATION ACT, 2012

BETWEEN

ANNAH JEPKEMOI BARMASAI.....PLAINTIFF

AND

STANLEY KIWALEI CHEBUNDO.....1ST DEFENDANT

MOSES KIGEN.....2ND DEFENDANT

VINCENT KIMURTO.....3RD DEFENDANT

RULING

This ruling is in respect of an application dated 29th April, 2020 by the plaintiff/applicant seeking for the following reliefs;

- a) Spent
- b) That this Honourable Court be pleased to summon MOSES KIGEN, VINCENT KIMURTO and MILKA KIGEN to show cause why they should not be committed to civil jail for a period up to six months for blatantly disrespecting this Honourable Court by disobeying court its orders dated 9th April, 2020.
- c) That the respondents be ordered to pay costs of this application.

The court ordered that the application be canvassed vide written submissions taking into account the prevailing circumstances of COVID 19 pandemic. Counsel relied on the grounds on the face of the application and the supporting affidavit sworn by the plaintiff/applicant and annexures thereto.

It was counsel's submission that the court gave the following orders on 9th April 2020:

- a) That urgency has been shown.
- b) That the application be served in 3 days with written submissions and the respondents/defendants to serve their replies and written submissions within 3 days after service.
- c) That highlighting of submissions to take place on 16th April, 2020 through Skype.

d) That temporary order of injunction restraining 2nd and 3rd defendants by themselves or through their agents from encroaching, ploughing, dislodging, displacing or evicting the plaintiff and her children from that property known as KIBONGE SETTLEMENT SCHEME PLOT 1 is hereby granted and to remain in force until the 16th April, 2020.

Counsel submitted that the court directed parties to file submissions and reserved ruling for 28th May, 2020.

Mr. Kibii counsel for the applicant submitted that the respondents and Milka Kigen, despite existence of the orders of this Honourable Court dated 9th April, 2020, on 20th April, 2020 flagrantly and willfully disobeyed the said court orders and forcefully invaded the suit property and commenced planting crops thereto. The restraining orders barred the respondents herein from dealing in any manner with the suit property whereas the applicant and her children were to continue peacefully enjoying occupation of the suit property.

Counsel submitted that the incident was reported at Kapatagat Police Station and Kipkwen Police post when the respondents invaded the suit property. Counsel further invited the court to examine the photographic evidence of the newly germinating crops annexed to the applicant's supporting affidavit and that none of the respondents has disputed or contested the fact that the crops in the aforesaid photographs are within the suit land.

Mr. Kibii Counsel for the applicant cited the case of Constitutional Court of Uganda in **Prof. Oloka - Onyango and 10 others vs Attorney General and others Constitutional Petition No. 8 of 2014** where it stated as follows; -

“... An exception to the above Rule is that where one has alleged a fact and the person against whom the fact is alleged, does not deny, he is presumed to have accepted that fact..... the respondent did not specifically deny the said allegations of violation and lack of Coram.....”

*In view of the above Rule and in the absence of a specific denial by the respondent in his pleadings with regard to issue one, we are unable to accept the submission of learned counsel Patricia Mutesi that the petitioners had a burden to do more than what they did, in the case of **HOG, Gandesha & another Vs G. J. Lutaya SCCA No. 14 of 1989**, Court observed that where facts are sworn to an affidavit, the burden to deny them is on the party. Failure to do that, they are presumed to have been accepted..... It is our decision that the respondent having been presumed to have admitted the allegations of the petitioners in the petition that there was no Coram, we find that on the balance of probabilities, the petitioners have proved that at the time the Prime Minister (twice) and Hon, Betty Aol, raised the objection that there was no Coram and Coram was never established, and that was in contravention of the Constitution and the Rules.”*

Counsel therefore submitted that the existence of the court order dated 9th April, 2020 with clear penal notice is not disputed and further that it is also not in dispute that the said orders were duly served as demonstrated by the return of service sworn on 21st April, 2020. That the respondents herein were served on 17th April, 2020 but proceeded to invade the suit property on 20th April, 2020 in disobedience of lawful court orders.

Mr. Kibii Counsel for the applicant submitted that the photographic evidence depicting germinating crops by the respondents does not constitute maintenance of status quo by all means or compliance of the restraining orders. He cited the case of **Abida Werimba Mwaniki 2 others (2017) eKLR** where the court observed that:

“In this particular case, it is not in dispute that the Plaintiffs were in possession of the subject properties. It would appear from the record that they had been in possession for many years and had actually built some residential structures and cultivated food crops, cash crops and other trees thereon.

Looking at the evidence of what happened on the subject properties, that is, destruction of numerous trees and food crops no reasonable person would probably conclude that such actions constituted maintenance of the status quo. The felling of trees using powered machinery and destruction of a fence cannot, by any stretch of imagination, be considered the constitute maintenance of status quo unless such action was ongoing prior to the order of status quo being recorded. The court, therefore, finds that in the circumstances of this case, the consent order was sufficiently or reasonably clear on what the Defendants were to refrain from doing.

The next element is service of the court order. It is true, as a general rule, that no person should be punished for contempt of court unless the relevant order he is alleged to have disobeyed had been served upon him together with a notice of penal consequences. However, where an order is made by consent or made in the presence of the concerned parties, subsequent service of the order is not mandatory. It is sufficient if it is shown that the Respondent was aware of or had knowledge of the court order.

*In the case of **Shimmers Plaza Ltd Vs National Bank of Kenya [2015] eKLR**, the Court of Appeal found the Managing Director of the Respondent guilty of disobedience of an order of "status quo" when he sold the subject matter of the appeal before the conclusion of the appeal. The status quo order was made in court in the presence of counsel for both the Appellant and the Respondent. The issue of personal service of the order was not upheld.....In the premises, the court is satisfied that there was destruction of the properties mentioned in the reports to the police and the report of the agricultural extension officer. The photographic evidence is also of persuasive value of the deliberate destruction that was undertaken by the Defendants and their agents. The court further finds that such violation was deliberate and calculated to undermine the consent order and the dignity of the court.”*

Counsel therefore urged the court to find that the respondents voluntarily and willingly breached/and or violated the orders of this Honourable Court dated 9th April, 2020 hence the respondents should show cause why they should not be committed to civil jail for

disobeying lawful court orders. Section 29 of the Environment and Land Court Act prescribes a penalty of 2 years' imprisonment or a fine of ksh20 million or both.

ANALYSIS AND DETERMINATION

This is an application for contempt of court for disobeying court orders issued on 9th April 2020 by this Honourable court. It is important to understand what contempt of court means. According to Black's Law Dictionary;

"Contempt is a disregard of, disobedience to, the rules, or orders of a legislative or judicial body, or an interruption of its proceedings by disorderly behavior or insolent language, in its presence or so near thereto as to disturb the proceedings or to impair the respect due to such a body."

In Halsbury's Laws of England, it is stated: -

"It was the plain and unqualified obligation of every person against or in respect of whom an order was made by a court of competent jurisdiction to obey it unless and until it was discharged and disobedience of such an order would as a general rule result in the person disobeying it being in contempt and punishable by committal or attachmentan application to court by him not being entertained until he had purged his contempt"

In book **The Law of Contempt** learned authors **Nigel Lowe & Brenda Sufrin** state a follows:-

"Coercive orders made by the courts should be obeyed and undertakings formally given to the courts should be honoured unless and until they are set aside. Furthermore, it is generally no answer to an action for contempt that the order disobeyed or the undertaking broken should not have been made or accepted in the first place. The proper course if it is sought to challenge the order or undertaking is to apply to have it set aside."

In order to succeed in civil contempt proceedings, the applicant has to prove

- a) the terms of the order,
- b) Knowledge of these terms.
- c) Failure to comply with the terms of the order.

In Peter K. Yego & Others vs Pauline Nekesa Kode Nakuru HCCC No No. 194 of 2004 the court recognizing that contempt of court is criminal, held that it must be proved that one has actually disobeyed the court order before one is cited for contempt. The applicant in an application for contempt must prove beyond peradventure that the respondent is guilty of contempt.

In the current case, an order was issued by this court on 9th April 2020 and the same was served on the respondents which is evidenced by the affidavit of service filed in court. The respondents have not disputed the service therefore it follows that they were properly served with the order.

It is also evident from the photographs annexed to the supporting affidavit that planting of crops which had been stopped continued unabated. This shows that the respondents willingly disobeyed the court order. If a party is aggrieved by an order of the court, there are set down procedures to show such displeasure and move to court to challenge or request for a review of the order. A party cannot be allowed to disobey court orders simply because they are unhappy with it. They must obey first, then question later.

Having found that the respondents were duly served with the terms of the order, had knowledge of these terms and has failed to comply with the terms of the order, I find that the respondents are in contempt of court. I order that the respondents appear in court within 14 days to show cause why they should not be committed to civil jail for contempt. Mention on 29 June 2020.

DATED and DELIVERED at ELDORET this 4th DAY OF JUNE, 2020

M. A. ODENY

JUDGE