



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC. CASE NO. 413 OF 2017

BETH JOSIAH NYAMAI (*Suing as the legal representative of the*

Estate of JOSIAH NYAMAI MUSYEMI (deceased).....**PLAINTIFF**

VERSUS

KALEKYE MUTISO.....**1ST DEFENDANT**

MUSAU MUTISO.....**2ND DEFENDANT**

MUSYIMI MUTISO.....**3RD DEFENDANT**

ISAAC MUTHAMA KIMILU.....**4TH DEFENDANT**

RULING

1. This Ruling relates to the Application dated 26th September, 2019 and filed on an even date by the Plaintiff. In the Application, the Plaintiff is seeking for the following orders:

a) Spent.

b) That the Honourable Court be pleased to order the committal to jail for a period not exceeding six (6) months the 1st, 2nd and 3rd Defendants/Respondents herein who are in contempt of an order of this Honourable Court issued on 7th December, 2018.

c) That the OCS Machakos Police station does enforce the orders of this Honourable Court sought in prayer 2 above and the order issued in 7th December, 2018.

d) That the costs of this Application be provided for.

2. The Application is supported by the Affidavit of the Plaintiff who has deponed that she filed an Application on 19th September, 2017 seeking the Respondents to be restrained from continuing with the construction on the property known as Plot 1 Part of L.R. No. 355/25 West of Machakos Municipality (*the suit property*) pending the hearing and determination of the Application and the main suit.

3. It was deponed by the Applicant that on 7th December, 2018, the court issued an order restraining the Respondents from developing the suit property; that the Respondents were served with the orders of the court and that despite the existence of the orders, the Respondents continued with the construction thereby violating the court orders.

4. The Plaintiff deponed that the disobedience of the orders of the court by the Respondents was reported to Kyumbi Police station and that on 6th September, 2019, the 2nd Respondent was arrested and charged with the offence of creating disturbance for chasing her from the suit property while armed with a bow and arrow.

5. It was deponed that it was in the interest of justice that the orders sought are granted. The Plaintiff annexed the copies of the Application, the court order, photographs of the construction works and a copy of the charge sheet in respect of the 2nd Respondent.

6. In his reply, the 1st Respondent deponed that the Respondents have not disobeyed the orders of 7th December, 2018; that no construction

has ever taken place on the suit property since the court issued its orders and that the alleged construction took place before any order was made by the court.

7. The 1st Respondent finally deponed that contempt of a court order is a matter of fact which the Applicant has to render cogent evidence and that the Application has been triggered by the already existing bad blood between the Applicant and the Respondents.

8. In the Supplementary Affidavit, the Applicant deponed that prior to the issuance of the court order on 7th December, 2018, the 2nd Respondent had started construction on the suit property; that the 2nd Respondent illegally began construction of a new structure on the suit property after the court had made its orders and that the 2nd Respondent was clearing the suit property for cultivation as at 15th August, 2019.

9. The Plaintiff's counsel submitted that the terms of the order (*or injunction or undertaking*) were clear and unambiguous and were binding on the Defendant; that the Respondents were not only served with the Court order but had or ought to have been informed by their counsel on record on the implications of the said order and that the Defendants acted in breach of the orders.

10. Counsel for the Respondent submitted that the Applicants have not proved to the required standard that the Respondents are in contempt of the orders of the court. Reliance was placed on the case of *Katsuri Limited vs. Kapurchand Depar Shah (2016) eKLR*.

Analysis and findings

11. Contempt of court consists of conduct which interferes with the administration of justice or impedes or perverts the course of justice. Civil contempt consists of a failure to comply with a Judgment or order of the court or breach of an undertaking of court (*See Osborne's Concise Law Dictionary, P. 102*).

12. In the case of *Sam Nyamweya & Others vs. Kenya Premier League Ltd and Others [2015] eKLR* Aburili J. stated as follows:

“Contempt of court is constituted by conduct that denotes wilful defiance of or disrespect towards the court or that wilfully challenges or affronts the authority of the court or the supremacy of the law, whether in civil or criminal proceedings.”

13. In the case of *Katsuri Limited vs. Kapurchand Depar Shah (2016) eKLR*, the court quoted the South African case of *Kristen Carla Burchell vs. Barry Grant Burchell, Eastern Cape Division Case No. 364 of 2005* where it was stated that in order for an Applicant to succeed in civil contempt proceedings, the Applicant has to prove the terms of the order; knowledge of the terms of the order by the Respondent and failure by the Respondent to comply with the terms of the order.

14. It is not in dispute that on 26th October, 2018, this court restrained the Respondents from cutting trees or disposing land known as Plot No. 1 Part of L.R. No. 355/25 West of Machakos pending the hearing of the suit. The record shows that the Ruling was delivered in the absence of the Respondents and their advocate.

15. The Applicant has deponed that the Respondents were all served with the copy of the order of the court, a fact that the Respondents have not denied. According to the Applicant, even after being served with the order, the Respondents continued to construct and cultivate on the suit property.

16. Although the Applicant has annexed photographs of the alleged cultivation that the Respondents were doing on the suit property, the said photographs do not indicate the person who cultivated the suit land. This court is therefore not in a position to ascertain if indeed the purported cultivation of the suit property, if at all, was done by the Respondents subsequent to the orders of the court or before the order was made.

17. Furthermore, it is not clear to this court if indeed the photographs that the Applicant is relying on are in respect to the suit property. One would have expected the person who took the photographs to swear an Affidavit explaining the circumstances under which the said photographs were taken, and the suit property to which they relate to.

18. That being the case, it is my finding that the Applicant has not proved that the Respondents are in contempt of the orders of 26th October, 2018.

19. The Application dated 28th September, 2019 is dismissed with costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 30TH DAY OF JULY, 2020.

O.A. ANGOTE

JUDGE