



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT & LAND CASE NO.318 OF 2013

NYANGOTO OGENDI NYAMWAMU.....PLAINTIFF

VERSUS

CHARLES ORORA MABEYA..... DEFENDANT

RULING

1. The plaintiff brought this suit against the defendant on 18th July, 2013 seeking; a permanent injunction to restrain the defendant from interfering with, damaging, wasting or doing anything prejudicial to the plaintiff on all that parcel of land known as **LR. No. Nyaribari Chache/B/B/Boburia/ 2626** (hereinafter referred to as “**the suit property**”) and an order for the eviction of the defendant from the suit property. In his plaint dated 17th July, 2013, the plaintiff averred that he is the registered proprietor of the suit property and that on or about the month of August, 2009, the defendant by himself and through his agents, servants and/or employees without any lawful excuse encroached on a portion of the suit property and erected temporary structures thereon for rental. The plaintiff averred that the defendant refused to vacate the said portion of the suit property even after being asked to do so by the chief of Basongo Location. The plaintiff averred that the defendant’s encroachment on the suit property is unlawful and that it was intended to defeat the plaintiff’s proprietary rights over the property.
2. Together with the plaint, the plaintiff filed an application by way of Notice of Motion dated 17th July, 2013 seeking a temporary injunction to restrain the defendant by himself or through his agents, servants and/or employees from entering onto, alienating, wasting, cultivating, constructing on, damaging, doing any activity on or in any manner interfering with the suit property pending the hearing and determination of this suit. The plaintiff’s application was supported by an affidavit sworn by the plaintiff in which, he reiterated that he is the registered owner of the suit property and that the defendant had entered thereon without his consent in August, 2009 and constructed temporary structures thereon for rental. The plaintiff deposed further that the defendant had refused to vacate the suit property despite several demands made upon him to do so.
3. The plaintiff’s application was listed for hearing on 28th November, 2013 when only the plaintiff’s advocate appeared in court. After the court satisfied itself that the defendant had been properly served, the plaintiff’s advocate was allowed to argue the application in the absence of the defendant notwithstanding. The court considered the application, the supporting affidavit and the submissions by the plaintiff’s advocate and allowed the same as prayed on the same day. The order made by the court on 28th November, 2013 restrained the defendant by himself or through his agents, servants and/or employees from “**entering into, alienating, cultivating, wasting, constructing on, damaging, doing any activity on or in any manner interfering with the suit property pending the hearing and determination of this suit**”.

4. The Plaintiff has now brought an application by way of Notice of Motion dated 5th June, 2014 seeking among others; an order that the defendant be cited for contempt of court and be committed to civil jail for a period not exceeding six (6) months for disobeying the order that was made herein on 28th November, 2013 referred to above. This is the application which is the subject of this ruling. The application is supported by the affidavit of the plaintiff sworn on 5th June, 2014. The application has been brought on the grounds that; the court issued an order herein on 28th November, 2013 restraining the defendant by himself or through his agents, servants and/or employees from among others entering into, doing any activity on or in any manner interfering with the suit property. The said order was served upon the defendant personally on 5th February, 2014. Despite service of the order against him, the defendant has continued to enter the suit property. The defendant and tenants to whom he has rented the structures that he has put up on the suit property have also prevented the plaintiff from accessing the property. The plaintiff has deposed that he visited the suit property on 10th February, 2014 and found the defendant thereon. Between March, 2014 and April, 2014 he visited the suit property four (4) times and on each occasion he found the defendant thereon. The plaintiff deposed that the defendant has rented the temporary structures that he had illegally put up on the suit property to seven (7) tenants from whom he has continued to collect rent. The plaintiff has deposed further that he visited the suit property again on 20th May, 2014 when he met the defendant and his said tenants on the property and they became violent towards him. The plaintiff deposed that the defendant's activities aforesaid are in contravention of the order issued herein on 28th November, 2013 and since the defendant has no respect for the court, appropriate punishment should be meted out against him.

5. The plaintiff's application was opposed by the defendant. In his affidavit sworn on 19th December, 2014, the defendant admitted that he was served with the order that was issued herein on 28th November, 2013. The defendant denied however that he has disobeyed the said order. The defendant denied that he entered the suit property on 10th February, 2014 and in the months of March and April, 2014 as claimed by the plaintiff. The defendant has deposed that the temporary structures that the plaintiff has complained about were erected and rented out to tenants before the order of 28th November, 2013 was issued by this court. The existence of the said structures and the tenants in occupation thereof cannot therefore amount to disobedience of the said court order.

6. On 19th February, 2015, the parties agreed to argue the plaintiff's application by way of written submissions. Both parties filed their respective submissions and the same are on record. I have considered the plaintiff's application and the replying affidavit that was filed in opposition thereto by the defendant. This is my view of the matter. It is now well settled that contempt of court proceedings are quasi criminal in nature because the contemnor risks losing his liberty if found guilty. In view of this, the standard of proof of contempt is higher than proof on a balance of probability. See, the holding in the court of appeal case of, **Mutitika -vs- Baharini Farm Ltd. (1985) KLR 227**, where the court stated that the standard of proof in contempt proceedings must be higher than proof on a balance of probability, and almost but not exactly, beyond reasonable doubt. It follows therefore that for the plaintiff to succeed in this application, the plaintiff has to satisfy the court to a degree beyond a balance of probability that the defendant has disobeyed the order of the court issued herein on 28th November, 2013.

7. As I have stated hereinabove, the plaintiff sought and obtained an order of prohibitory injunction to restrain the defendant from among other things entering or undertaking any activity on the suit property. Service of the said order is admitted. What is in dispute is whether the order has been disobeyed or not. The plaintiff has contended that after the order was served upon the defendant on 5th February, 2014, the defendant in disobedience thereof entered the suit property on a number of occasions. He is said to have entered the suit property on 10th February, 2014, four(4) times in the months of March and April, 2014 and, on 20th May, 2014. The plaintiff has claimed that he personally saw the defendant on the suit property on the said occasions. The defendant has denied that he has been on the suit property since he was served with the order issued herein on 28th November, 2013 on 5th February, 2014. The onus was on the plaintiff to prove that the defendant entered the suit property on the occasions that I have set out above. What I have before me is affidavit evidence. The plaintiff has in his affidavit and supplementary

affidavit insisted that the defendant entered the suit property. The defendant has in his affidavit in reply denied that allegation. The court has to determine who is telling the court the truth as between the plaintiff and the defendant. This will mean that the court will have to believe one affidavit as against the other.

8. Having considered the three affidavits before me, two by the plaintiff and one by the defendant, I have no reason to believe either of the parties. I am of the view that this is a proper case in which the veracity of averments contained in these affidavits should have been tested on cross-examination under Order 19 rule 2 of the Civil Procedure Rules. The court would have been in a better position after receiving oral evidence to determine the issue at hand, namely whether the defendant entered the suit property after 5th February, 2014. Under Order 19 rule 2 of the Civil Procedure Rules, the court can only order the attendance of a party for cross-examination on application by a party to the proceedings. None of the parties herein made the application. I am of the view that since the onus of proof of contempt was on the plaintiff, the plaintiff should have applied to court for leave to cross-examine the defendant on his affidavit.

9. As things stand now, I have affidavits before me which are completely at variance on the facts under consideration. Section 107 of the Evidence Act, Cap 80 Laws of Kenya provides that; whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. In view of what I have stated above, the plaintiff has not satisfied me that the defendant entered the suit property after he was served with the order issued herein. Apart from the mere assertion by the plaintiff, there is no other material or evidence pointing at the defendant's entry onto the suit property. On the issue of the temporary structures that the defendant had put up on the suit property and from which the plaintiff has claimed that he continues to collect rent, I am in agreement with the defendant's submission that the said structures were put up before the order of 28th November, 2013. The order of 28th November, 2013 did not compel the defendant to remove the said structures from the suit property neither did it restrain the defendant from collecting rent from the tenants in occupation thereof. The existence of the said structures on the suit property and the defendant's continued collection of rent from the tenants in occupation thereof cannot therefore be said to be in breach of the court order that was issued herein on 28th November, 2013. I am not satisfied therefore that the defendant has met the threshold for proof of contempt.

10. The upshot of the foregoing is that the plaintiff's application dated 5th June, 2014 is not for granting. The same is dismissed accordingly with costs to the defendant.

Delivered, Dated and Signed at KISII this 8th day of May, 2015.

S. OKONG'O

JUDGE

In the presence of:-

Mr. Omwega for plaintiff

Miss Moguche for defendant

Mr. Bosire Court Clerk

S. OKONG'O

JUDGE