



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KITALE**

**LAND CASE NO. 86 OF 2010**

**JANE KANDA KIPKORIR.....PLAINTIFF**

**VERSUS**

**DORCAS CHEBET.....1<sup>ST</sup> DEFENDANT**

**MR. KUNDU.....2<sup>ND</sup> DEFENDANT**

**DORCAS CHEBET.....3<sup>RD</sup> DEFENDANT**

**JONATHAN KIPKORE KIMWAI.....4<sup>TH</sup> DEFENDANT**

**KIPKORIR KIPKALAMU.....5<sup>TH</sup> DEFENDANT**

**DORCUS JEPKEMOI CHEBET.....6<sup>TH</sup> DEFENDANT**

**RULING**

1. The application dated 21/7/2020 has been brought by the plaintiff under Sections 1A, 1B, 3, 3A and 63 of the Civil Procedure Act, Order 51 Rule 1, Section 5 of the Judicature Act and Section 29 of the Environment and Land Court Act. It seeks the orders which are set out verbatim as hereinbelow:-

**(1) ...spent**

**(2) The defendants be summoned to appear before this Honourable Court to show cause why they should not be punished for failing to obey eviction order issued by this court on 16<sup>th</sup> August, 2016 and re-issue on 22<sup>nd</sup> November, 2019 requiring the defendants to forthwith vacate plot number 1615 Milimani settlement scheme.**

**(3) In default of appearance a warrant of arrest be issue compelling attendance and the same be executed by the OCPD, Cherangani and the County Police Commander, Trans-Nzoia.**

**(4) The costs be paid by the defendants.**

2. The application is supported by the affidavit of the plaintiff sworn on 21/7/2020 and bears a summarized form of the grounds it is premised on at its bottom which are as follows: that the court made a decree dated 16/8/2016, the same was extracted and served and subsequently an eviction order was issued on 16/10/2016 requiring the defendants to vacate the suit land; that the defendants have acted in breach thereof by interfering with the suit land and have completely refused to vacate; that the respondent did file an application to review the judgment which application was dismissed by this court; that it is necessary for the defendants to be punished to uphold the integrity and dignity of the court; that the defendants have taken advantage of the suspension of all systems during the occurrence of the global Covid 19 pandemic to cause mayhem and total disobedience to the rule of law and that they have also endangered the security of the applicant.

3. In response to the application dated 17/1/2020, the 6<sup>th</sup> defendant filed a replying affidavit sworn on 6/8/2020. Her response is that she is the registered owner of Trans Nzoia/Milimani/1527 and the judgment of this court in the matter ordered her to surrender a part of that land which had formed part of plot number Trans Nzoia Milimani/1615; that she has not surrendered the land as ordered; that however she has never taken the portion of plot no Trans Nzoia Milimani/1615; that the County Surveyor is required to go to the site and excise her 2.01 ha stretching from the river up to the boundary of Trans Nzoia Milimani/1615 in order to put the matter to a rest. She denies being in contempt of court.

4. The plaintiff filed her submissions on **11/8/2020**. The defendants filed their submissions on **14/8/2020**. I have considered the application, the response and the submissions filed.

5. The issues that arise from the instant application are as follows:

***(a) Whether the defendants should be summoned by this court to attend and show cause why they should not be punished and whether, if the order issues, the defendants should be arrested to compel their attendance.***

***(b) What orders should issue?***

6. The issues are addressed herein under:

***(a) Whether the defendants should be summoned by this court to attend and show cause why they should not be punished and whether, if the order issues, the defendants should be arrested to compel their attendance.***

7. The application has been brought under **Section 5** of the **Judicature Act**. **Section 29** of the **Judicature Act**. The application before me was filed in the year **2020**. From the notes appearing on the Act it is apparent that that Section was repealed in the year **2016** vide **Act No. 46 of 2016, S. 38**. **Section 29** of the **Environment And Land Court Act** provides as follows:

**“29. Offences**

**Any person who refuses, fails or neglects to obey an order or direction of the Court given under this Act, commits an offence, and shall, on conviction, be liable to a fine not exceeding twenty million shillings or to imprisonment for a term not exceeding two years, or to both.”**

8. It is clear that the judgment in this suit found that two distinct parcels exist and were involved in this matter. These are parcels No. **1527** and **1615** and they lie adjacent to each other. The defendants are said to have uprooted the beacons on the common boundary between the two parcels and sowed crops on the plot No. **1615**. The owner of plot number **1527** combined it with plot No. **1615**, claiming ownership of both plots. The surveyor who visited the site confirmed such annexation and cultivation of plot **1615**. This court then found the defendants to be in trespass on plot **1615**. The 6<sup>th</sup> defendant’s counterclaim alleging interference with her land by the plaintiff was dismissed.

9. There is no report of the surveyor attached to the application showing that the uprooted beacons were restored and that the defendants are still in occupation of plot number **1615**. Such a report would have been necessary for the success of the instant application for it would have conclusively determined whether the defendants are in occupation of plot No. **1615**. The replying affidavit by the 6<sup>th</sup> defendant who had annexed plot number **1615** to her plot has denied continued occupation of the plaintiff’s plot but avers that there is need for the County Surveyor to visit the site and re-establish the boundaries to bring this dispute to closure.

10. This court is unable to find any merit in the instant application. The court’s jurisdiction to punish parties for their disobedience of court orders exists in the **Environment and Land Court Act** provisions cited by the applicant as well as under common law. The court also has jurisdiction to bring a long drawn out litigation to an expedited end in accordance with the overriding objective of **Sections 1A, 1B** and **3A** of the **Civil Procedure Act** provisions cited by the applicant. However any punitive action against a party for disobedience must be taken only in the clearest of cases especially due to the fact that the process of punishment for contempt of court orders is quasi-criminal in nature may include loss of a subject’s liberty.

11. In the Court of Appeal decision **Woburn Estate Limited v Margaret Bashforth [2016] eKLR** the court observed as follows:

**“We reiterate that contempt proceedings being of quasi - criminal in nature and since a person may lose his right to liberty, each stage and step of the procedure must be scrupulously followed and observed. We bear in mind the often-cited passage attributed to Lord Denning In Re Bramblevale Ltd [1970] 1 CH 128 at page 137 that;**

**“A contempt of court is an offence of criminal character. A man may be sent to prison for it. It must be satisfactorily proved showing that when the man was asked about it, he told lies. There must be some further evidence to incriminate him.”**

**In the result we find that the learned judge erred in the decision he reached holding the appellant liable in contempt and the punishment he imposed.”**

12. In the instant application this court is being asked to summon the defendants to show cause why they should not be punished. As I have noted there must be a *prima facie* case of contempt of court set out against them, which has not been sufficiently rebutted, and orders must have already issued convicting them of contempt before this court can summon them.

13. I find that where no application has been made for the court to cite the defendants for contempt of the orders of this court, as in this case, then this court can not issue summons to them to appear before it to show any cause. Notwithstanding the provisions of **Section 29** of the **Environment and Land Court Act** this court must demand to see a prior order arising from the trial of the issues as to whether service of the order was effected, whether the alleged contemnor knew of the order, whether the order has been disobeyed, and finally, finding the defendants guilty of contempt.

14. **Section 29** aforementioned does not oust the applicability of due process that may find the defendants guilty of contempt prior to

punishment in environment and land litigation.

15. In this court's view the instant application has no merit for the reasons aforesated.

***(b) What Orders should issue?***

16. The upshot of the foregoing is that the application dated **21/7/2020** is hereby dismissed. In lieu thereof, this court, acting under the provisions of **Section 1A, 1B and 3A** of the **Civil Procedure Act** and in furtherance of the Overriding Objective of the Rules, hereby directs that the County Surveyor and the County Land Registrar shall visit the site and establish the boundary between plot number **Trans-Nzoia/Milimani/1527** and **Trans-Nzoia/Milimani/1615** as they ought to be and according to the Registry Index Map and each party shall thereafter abide by that boundary.

17. The costs of the boundary restoration exercise shall however be borne by the defendants jointly and severally and shall be settled within **30** days from the date hereof failure to which the plaintiff will be at liberty to settle those costs to facilitate the boundary restoration exercise to be conducted by the officers aforementioned. In the latter event the plaintiff shall be refunded the survey expenses by the defendants jointly and severally within **21 days** of such settlement, and in default of refund the plaintiff shall be at liberty to execute the same in the normal manner as though they were costs in the main suit.

18. The costs of the instant application shall however be borne by the plaintiff.

It is so ordered.

**Dated, signed and delivered at Kitale via electronic mail on this 30<sup>th</sup> day of September, 2020.**

**MWANGI NJOROGE**

**JUDGE, ELC, KITALE.**