



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
ELC CIVIL SUIT NO. 145 OF 2009

KESI GWEDE.....PLAINTIFF

-VERSUS-

RAMA ATHMAN.....DEFENDANT

RULING

1. The plaintiff/applicant having obtained leave filed the application dated 30.1.15 seeking the following orders :-

1. The honourable Court be pleased to issue an order for detention in prison for contempt of Court against the defendant herein.
2. That the OCS Mwangulu Police Station do assist to ensure the respondent desist from cultivating or putting up permanent structures on the suit property
3. Costs of the application be provided for

2. The application is supported by 5 grounds on the face of it inter alia that the orders issued on 6th September 2012 was served on the defendant on 27th May 2013 which orders the defendant has disobeyed by cultivating and putting up permanent structures on the suit property. The application is supported further by the affidavit sworn by the applicant. This affidavit has deposed to the same words contained in the grounds of the application and annexed copies of the order and the ruling.

3. The application is opposed by the defendant. In his replying affidavit, the defendant/respondent deposed that no evidence has been placed before the Court to prove the allegations levelled against him. He also deposed that the orders have elapsed by the effluxion of time as 12 months has since lapsed. The respondent deposed further that he left farming in the area the subject of the suit and that this application is brought to harass him.

4. The parties filed written submissions. The applicant submitted that the defendant although served did not enter appearance therefore the documents filed by Okanga and Co Advocates are not properly on record and should be struck out and the application allowed as unopposed. On proof of contempt, he submitted the defendant was served personally with the orders of 27.5.2013 but which he has disobeyed. The applicant stated that he attached photos in his application for leave filed on 8.10.2013 and that the defendant has not denied he is in contempt.

5. The defendant in his submission denied being in breach of the said orders. He also submitted that no affidavit of service was filed to show that he was served. The respondent submits that the orders have clearly lapsed by operation of law in order 40 rule 6 as this application was filed 2.5 years after the order was issued. Lastly the advocate submitted they are properly on record having entered appearance on 17.6.2009. He urged the Court to dismiss the application for lacking in merit.

6. I have studied the pleadings filed and the submissions rendered. In contempt proceedings which is meant to protect the dignity of the Court and the rule of law an applicant is required to prove the following before a party is punished for being in contempt

1) The order was served

2) The party has indeed disobeyed that order

The standard of proof of disobedience is higher than civil proceedings and almost equivalent to the beyond reasonable doubt in criminal proceedings. This is because a party's liberty will be taken away if found guilty.

7. The preliminary point of the issue of representation of the defendant is necessary to be determined first since in the applicant's view this application is unopposed as the documents filed in opposition is improperly on record. From the documents filed, on 17th June 2009, the firm of Okanga & Co advocates entered appearance for the defendant, 3 days after the defendant was served with summons to enter appearance as per the affidavit of service filed on 17.6.09. Subsequently to the memo of appearance, there is a defence on record filed on 16.9.2009 and grounds of opposition filed on 30.9.2009. The replying affidavit filed to challenge the contempt proceedings is thus properly on record.

8. As regards service of the order, the respondent did not deny service in the replying affidavit. The same is introduced in the submissions which is improper. In any event the record shows on 6th September 2012 when the ruling was read, Ms Anyumba held brief for Mr Okango advocate for the defendant. The copies of the ruling are recorded to have been given to parties. The defendant was therefore aware of the order. On whether the order lapsed by operation of law, I do not agree. The order was issued **“restraining the defendant... in any manner whatsoever and or evicting the plaintiff therefrom pending hearing and determination of this suit”**. This suit is also within the defendant's knowledge that due to backlog of cases, it is nearly impossible to finalise cases within 12 months of date of filing. The order is therefore still lawfully in force until the suit will be determined.

9. The last and important limb is whether there is proof of disobedience on the part of the defendant. On the face of the application, an averment is made that the defendant/respondent has disobeyed this order by cultivating the land and building permanent structures. This averment is repeated in paragraph 4 of the supporting affidavit. The applicant then attempts to prove acts of disobedience by submitting that the photographs were annexed in the application for leave. I have taken time and flipped over the pleadings of 8.10.2013. Interestingly, the supporting affidavit in this application is copy paste word for word of the supporting affidavit sworn in support for leave to commence these contempt proceedings.

10. The application for leave was drawn by the applicant in person. There are no photographs annexed to it. The current application was drawn by legal counsel who understands the intensity and seriousness of seeking to commit a party to civil jail for contempt. Instead he approached the Court in such a casual manner. This Court therefore is not told what structures were subsequently put up after the order was issued or what crops are planted and when they were planted. There is no iota of evidence shown to this Court proving the acts of disobedience complained of against the defendant. This Court cannot therefore punish him for contempt for acts not proved to have been committed.

11. The upshot is that I find the application is lacking in merit and an abuse of the Court process. I do hereby dismiss it with costs to the defendant.

Ruling dated and delivered in Mombasa this **8th** day of **October, 2015**

A. OMOLLO

JUDGE