



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUSIA

CIVIL CASE NO. 7 OF 2018

VALENTINE SITUMA ACHUNGO.....1ST PLAINTIFF

LOUIS MAKASA ACHUNGO.....2ND PLAINTIFF

JAMES BAHATI ACHUNGO.....3RD PLAINTIFF

= VERSUS =

CONRAD ACHUNGO.....1ST DEFENDANT/RESPONDENT

LAND REGISTRAR,

BUSIA DISTRICT LAND REGISTRY.....2ND DEFENDANT

R U L I N G

1. The plaintiffs moved the court vide the application dated 14/4/2020 brought under order 40 and 51 of Civil Procedures Rules 2010 and section 29 of the Environment and Land Court Act. The applicant prays for orders that;

1) Spent

2) That the Honourable Court do issue specifically a temporary injunction against the 1st defendant, his agents or anybody acting on his behalf or claiming under him be restrained from entering, trespassing, invading, settling and/or in whatsoever manner interfering with the physical possession and/or ownership of the plaintiffs property known as Title Nos. Marachi/Esikoma/2189, Marachi/Esikoma/2188 and Marachi/Esikoma/2187 pending the hearing and determination of this suit and or any further orders of his court.

3) That the Honourable Court be pleased to make a finding that the 1st defendant/respondent Mr. Conrad Achungo has committed an offence of Contempt of Court by wilful disobedience of the Court Order of 7th October, 2019.

4) That an order be issued for the 1st defendant/respondent Mr. Conrad Achungo to be committed to civil jail for six (6) months and to pay a fine of Kshs.1,000,000.00 for Contempt of Court.

5) This Honourable Court do make such further Orders that it deems fit in the circumstances of the Case.

2. The application is premised on several grounds *inter alia*;

(i) The plaintiffs are the registered owners of all that parcel of land known as Title Nos Marachi/Esikoma/2189, Marachi/Esikoma/2188 and Marachi/Esikoma/2187 measuring approximately 1.18 Ha, 1.4 Ha and 1.4 Ha situate in Busia, whereas one Mr. Ambrose Luke Achungo (Deceased) who was the father of the plaintiffs and the 1st defendant, is the beneficial owner of parcel land known as Marachi/Esikoma/1241, situated in Busia County.

(ii) On the 7th October, 2019 the Court made an order, in presence of the 1st defendant, that the prevailing status Quo as pertains the subject properties Title Nos Marachi/Esikoma/2189, Marachi/Esikoma/2188 and Marachi/Esikoma/2187 be maintained and the parties to the dispute to keep peace.

(iii) The 1st defendant has breached the Court Order of 7th October, 2019 by trespassing into the plaintiffs' home situated on

portions of Title Nos. Marachi/Esikoma/2189, Marachi/Esikoma/2188 and Marachi/Esikoma/2187 on several occasions during the month of January, 2020 and more particularly by chasing away the 1st plaintiff's agents from the land parcel number Marachi/Esikoma/2189 sometime during the week of 29th January 2020 and during the first week of February 2020, and more recently on 6th April, 2020.

3. The application is supported further by the affidavits sworn by the 1st applicant on 14/4/2020 and 20/4/2020. The 1st applicant deposed that on 7/10/2019, they informed the Court that the 1st defendant would visit their homestead and threaten the occupants therein and also threaten the 1st applicants' agents found tilling parcel No. Marachi/Esikoma/2189. Therefore, the Court gave an order for maintenance of status quo and parties to keep peace pending further orders of the court.

4. The applicants continued that on October and November 2019, the 1st defendant demanded for opening of the door to the house of 1st applicant's mother but their caretaker declined to do as demanded. Further that the 1st defendant chased away Mary Nyabola who had been tilling a portion of the suit title with permission of the 1st applicant. The 1st defendant did a letter to the said Mary Nyabola on 29/1/2020 which letter the applicant states was copied to his mother. That the 1st defendant further warned Charles Auma Mulindo and "Odinga Mmidi" from tilling the land/planting trees yet they were doing so at the instruction of the 1st applicant. According to the applicant, the prevailing status quo is their occupation of the suit parcels and also their mother tilling the same for their subsistence.

5. In the further affidavit, the 1st applicant deposed of the activities of the 1st defendant post the date the temporary orders this court issued on 17th April 2020.

6. The 1st defendant opposed the application through his replying affidavit filed on 12/5/2020. He deposed that the application is an abuse of the due process of the law because;

(i) This suit seeks for a permanent injunction against the respondent herein and to grant an injunction at this level amounts to determining the suit before the full hearing. It is on the basis of the above that the court rather than granting a temporary injunction on the 7/10/2019 made an order of the maintenance by the parties of the status quo which the respondents have obediently complied with.

(ii) That the applicants have not exhibited that they have complied with the well laid down grounds for grant of injunction such as irreparable damage incapable of compensation by an award of damages as set out in the famed case of Giella versus Cassman Brown.

(iii) That this application equally is seeking a myriad of Orders-injunction and punishment for contempt of court. The two prayers should have been sought by way of two (2) distinct separate applications.

7. It is the 1st defendant's position that the depositions in paragraphs 8 – 14 are all falsehoods as the applicants are also in breach of the status quo order by leasing out to third parties portions of the suit land. That there has been no trial conducted upon which the 1st respondent can be convicted. He urged the Court to vacate the interim orders of injunction issued to avoid the Court issuing conflicting orders.

8. The applicants filed their written submissions dated 21/5/2020 pursuant to the directions given by this court on 17/4/2020. There was no submissions on record for the 1st defendant as at the time of writing this ruling. The application is an omnibus look alike because in prayer (2) it is seeking for orders of temporary injunction while in prayers (3) and (4) are seeking orders that the 1st defendant be found to be in contempt of court and be punished for it.

9. From the pleadings and submissions of the applicants, they dwelt on the subject of disobedience of the court order of 7/10/2019. The applicant quoted the provisions of section 29 of the Environment and Land Court Act which states thus;

“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”.

10. The applicants further relied on the decision of *WORBON Estate Limited VS Margret Bashfort (2016) eKLR* where the Court of Appeal held;

“We have gone to this great length to demonstrate how, before the passage of these legislations the powers of the High Court and this Court to punish for contempt of Court were dynamic and kept shifting depending on the prevailing Laws in England. Today each level of court has been expressly clothed with jurisdiction to punish for contempt of court.”

11. In elaborating the acts constituting the contempt the applicants pin pointed two incidents i.e.

- *The 1st defendant has on two occasions in October and November 2019, visited the plaintiffs' homestead which is situated on portions of Title Nos Marachi/Esikoma/2189, Marachi/Esikoma/2188 and Marachi/Esikoma/2187 and insisted that the door to the main house where the plaintiffs mother resides be opened.*
- *In January, 2020, the 1st defendant trespassed into the 1st plaintiff's land known as land parcel number*

Marachi/Esikoma/2189 where he found one Maria Nyabola tilling a portion of the land and chased her away.

12. In my view, the applicants did not endeavour to demonstrate existence of the principles for granting an order of injunction. Thus, it is this court's finding that prayer (2) seeking temporary orders of injunction has not been proved. The same is dismissed.

13. On the second limb of the application, It is trite law that contempt of court must be strictly proved as it borders on taking away the liberty of a person as stated by Lord Denning in the case of ***Re Braemby Vale Ltd (1969) 3 ALL ER 1062***. The burden of proof rested on the applicants to so do. The order of 7/10/2019 which is alleged to have been disobeyed stated thus;

“Parties to maintain the prevailing status quo and also keep peace pending further orders of the court. Parties also granted time to pursue an out of court settlement. In the event no settlement is reached, the hearing to proceed on 3/3/2020”.

14. It is the order of maintaining status quo and keeping peace which the applicants averred has been disobeyed. The 1st applicant deposed that the 1st defendant stopped Mary Nyabola and Charles Mulindo who had his permission from tilling and planting trees respectively on the suit land. According to the 1st defendant's advocates letter dated 29th January 2020 addressed to Mary Nyabola and copied to the 1st applicant's mother, the 1st defendant was complaining that the suit land had been leased to the said Mary Nyabola in contravention of the court order.

15. Yet the 1st applicant deposed that Mary Nyabola was tilling the land with his permission. According to this Court, permission can be granted in several modes and leasing is one such method. Mary Nyabola is not a party to these proceedings neither did she swear an affidavit to state in what capacity she was tilling the land. This creates doubt in the plaintiffs' case whether or not he leased the land to Mary Nyabola. Mary Nyabola is a 3rd party against whom cannot enjoy benefits of a status quo order unless evidence was presented to demonstrate that she was working on the land on behalf of the 1st applicant.

16. The applicants also deposed that the 1st defendant assaulted Charles Mulindo who is the applicant's first cousin and employee. The applicant relied on the P3 annexed as 'A' in the further affidavit. On the face of the P3 it is recorded that Charles Auma was assaulted by a person known to him on 19/5/2020. The name of the person is not given and the said Charles has not sworn an affidavit to confirm that it is the 1st defendant who assaulted him. The 1st applicant has not deposed that he was present during the incident therefore his depositions are based on hearsay which required to be corroborated but has unfortunately not been done.

17. In the case of ***Mutitika Vs Baharini Farm Ltd (1965) eKLR*** the Court stated thus ***“Applying the test that the standard of proof should be consistent with the gravity of the alleged contempt, we hold that it has not been shown that the respondents intended to drive out the applicants, and that their actions were only consistent with an intention that they should vacate the land when they ploughed the whole area. The evidence of Joshua that he had stock on the land was forcibly challenged by Councillor Rono and in our view it is not safe to decide this aspect against the respondents. Councillor Rono's evidence that there was no forcible eviction was not challenged, or, indeed denied.”*** (underline mine for emphasis).

18. Guided by the Mutitika case above, I am persuaded to find that the application lacks merit because the nature of permission to use the land by Mary Nyabola is challenged by the 1st defendant and the applicants did not elaborate. Further, no evidence was put forth to link the 1st defendant to the assault of Charles Mulindo (who is not a party to these proceedings). The interim order of injunction earlier issued is vacated and orders of maintenance of status quo remain in place pending determination of the suit. The application is hereby dismissed with costs to the 1st defendant.

Ruling dated, signed and delivered at BUSIA this 17th day of September, 2020.

A. OMOLLO

JUDGE