



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUNGOMA
MISC. CIVIL APPL. NO.104 OF 2013

NELSON W. MUCHEMO.....APPLICANT

VRS

JOSEPH WEKULO MUCHEMO.....1ST RESPONDENT

DAVID CHIVOLE MUSONYE.....2ND RESPONDENT

ELIJAH OTHIENO OTIENO.....3RD RESPONDENT

RULING

1. The Applicant is seeking to commit the Respondents to civil jail for being in contempt of court order issued on 12th November 2007 in BGM CC No.14 of 2005. The application is based on the grounds on the face of it and the supporting affidavit sworn by the Applicant. One of the grounds provided is that the order was made in the presence of the Respondents.

2. The application is opposed by the Respondents. The 3rd Respondent has sworn an affidavit on his behalf and on behalf of the 1st and 2nd Respondents. In para. 7 of the replying affidavit, the 3rd Respondent depones the order did not stop them from cultivating the land. According to them; it is the Applicant and his brothers who are engaged in acts of burning and destroying cane. The Respondents have denied ever selling the suit land.

3. I have considered the pleadings and submissions put forth by both parties. I herebelow paraphrase the order that was entered on 12th November, 2007;

“By consent, the status quo pertaining to parcel nos.Kakamega/Sirungai/1676, 1677, 1231 and 1232 and Kakamega/Sirungai/409 be maintained pending the hearing and determination of this suit.”

4. The Applicant depones that the Respondents have breached this order by sub-dividing the parcels of land and have sold them. He annexed letters written by the village elder and assistant chief. In the elder's letter dated 25/4/2013, it says the Applicant is complaining the 3rd Respondent has constructed a house and fenced land that has a case pending in court.

5. In the letter dated 24/3/2008, the author says boundary features for plot 1676 has been interfered

with and the “*said land has been newly demarcated*”. The letter does not however indicate who has among the Respondents have tampered with that boundary. The photograph of the incomplete house is also not indicated to be on which plot, who built it and whom it was built for.

6. In an application for contempt, before a Respondent is punished, proof required is that for criminal offences i.e beyond reasonable doubt (See Re Bramble vale [1970] 1 CH 128, [1969] 3 ALL E.R.1062.) In the instant case, the applicant has alleged the suit properties have been sub-divided. There is no extract from the lands office annexed to show that any of the plots have been sub-divided. They have also not annexed copies of certificates of official searches that would show any of the plot numbers have since changed.

7. On the aspect of sale, the Applicant has annexed proceedings emanating in Kakamega CM's Court Criminal Case (no. not legible) where the 1st Respondent was charged with the offence of making false declaration contrary to Section 114 of the Penal Code. It is alleged the 1st Respondent made a false declaration that he was also known as “Muchemo Fundia” who was registered as owner of parcel No. Kakamega/Serungai/409. In my view, impersonation or making a false declaration cannot in itself constitute a sale of land agreement. Secondly, the 1st Respondent was acquitted of this charge. The Applicant submits the acquittal was on a technicality. It is not for this court to question or analyse the validity or otherwise of that acquittal. I therefore find the Applicant has not proved any of the Respondents have sold the suit parcels contrary to the court order.

8. The Applicant has denied the allegations put forth by the Respondents that he is the one in breach of the order. However, given the premises that it is not the applicant that is being alleged to be in contempt, I will not analyze the documents annexed in the replying affidavit of the Respondent.

9. In conclusion, I make a finding that the Applicant has failed to prove within the standards required that the Respondents are in contempt of the order of the court issued on 12/11/2007. The application is therefore dismissed with costs.

Dated, signed and delivered at Bungoma this 13th day of May 2014.

A. OMOLLO

JUDGE