REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

ENVIRONMENT AND LAND CIVIL SUIT NO.216 OF 2013

ELIJAH NGUNJIRI MWENENIA ……..……PLAINTIFF /APPLICANT

VERSUS

KIRICHU NDEGWA …….....……DEFENDANT/RESPONDENT

RULING

1.This ruling is on an application made by the plaintiff/ applicant by way of notice of motion dated **3rd September, 2013** seeking among other orders that **Moses Muchangi Kirichu** and **Samuel Wanjohi Kirichu,** (hereafter referred to as Defendant's sons) children of the defendant be committed to civil jail for disobedience of the court order dated **1st November 2012.**

2. The application is premised on the grounds that ;

> **(i) Between December 2012 and August 2013, the defendant's aforesaid children; Moses Muchangi Kirichu and Samuel Wanjohi Kirichu have without any colour of right entered into the applicant's parcel of land being Laikipia/ Salama Muruku Block 1/828 (hereafter referred to as the suit land) and planted maize, potatoes and recently in August 2013 they started constructing a house.**
>
> **(ii) That the said acts are in total contravention of the court order for maintenance of status quo issued on 1st November 2012 and Moses Muchangi Kirichu and Samuel Wanjohi Kirichu ought to be punished for their disobedience of the court order.**
>
> **(iii) That the defendant aforesaid children are hell bent on interfering with the suit land unless this court intervenes promptly.**
>
> **(iv) That in the interest of justice the prayers sought herein ought to be granted.**

3. The application is supported by the affidavit of **Elijah Ngunjiri Mwenenia** sworn on **3rd September, 2013.** He depones that on **14th November, 2012** the court granted an order for maintenance of status quo which was confirmed in a ruling delivered on **9th July, 2012** pending the hearing and determination of the suit. The order meant that not only was the defendant restrained by himself but he was so restrained together with his children, agents, workmen and servants from interfering with suit land. Despite being aware of this order, the Defendant's sons on diverse dates entered onto the suit land, planted maize and potatoes and started constructing a house in total contravention of the court order and should therefore be punished for the contempt.

4. The Defendant's sons opposed the application through their replying affidavit sworn on **14th**

November, 2013. They deponed that they had never been parties to this suit, are not the legal representatives of their father's estate and are strangers to all the accusations levelled against them by the plaintiff; that prior to his death their father had never discussed the contents of his case with them, the orders of status quo issued had never been served upon them and they were strangers to its contents and can therefore not be cited for disobeying what was not within their knowledge.

5. When the application came before me for inter parties hearing on **4th February, 2014** Counsel for the applicant reiterated what was contained in the grounds of the application and the affidavit by the applicant.

6. Counsel for the Defendant equally reiterated what was contained in the replying affidavit of the defendant's sons. In addition he submitted that this suit had abated on **14th January, 2014** as the defendant had passed on in **January 2013**. On the issue of consent he submitted that before punishing a party, the court must satisfy itself beyond reasonable doubt that the person being punished was a party in the suit and was personally served with the court order. He submitted that the Defendant's sons had not personally been served with the order, were not in court when the order was pronounced and had all along been cultivating the suit land even before their father died totally unaware that such an order existed.

7. In response, counsel for the applicant submitted that the Defendant's sons were not challenging the order but only the process. Their contention was that they were not parties to the suit therefore under no obligation to obey the order and that they were not personally served. He submitted that what the Defendant's sons were raising were mere technicalities which belonged to the past. He stated that the issue of the suit abating was not an issue in the application and that a decree could be enforced without substituting an administrator.

8. I have carefully considered the pleadings, affidavits and the rival submissions by counsels for the respective parties. I find the following issues for determination:

i) Has the suit abated?

ii) Have Moses Muchangi Kirichu and Samuel Wanjohi Kirichu, children of the defendant flouted the orders issued by the court 1st November 2012 against Kirichu Ndegwa

(iii) what is the order as to costs?

9. I will first address the issue of whether the suit has abated. I am aware that this was not raised by the respondents in their replying affidavit and has only been raised at the bar but it is important for me to consider whether this suit has life or not.

Order 24 (4) of the Civil Procedure Rules 2010 provides:

> **4. (1) Where one of two or more defendants dies and the cause of action does not survive or continue against the surviving defendant or defendants alone, or a sole defendant or sole surviving defendant dies and the cause of action survives or continues, the court, on an application made in that behalf, shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit.**
>
> **(2) ……**
>
> **(3) Where within one year no application is made under subrule (1), the suit shall abate as against the deceased defendant.**

10. The applicant filed this application for contempt on **4th September, 2013** nine months after the Defendant had passed on. When this application was filed, the suit had not abated. However at the time of

hearing the application and delivering this ruling the suit has since abated. From the record no step has been taken to place the legal representative in the suit in place of the defendant. Under the circumstances, I find that the suit has by virtue of **Order 24(4)** of the **Civil Procedure rules** abated as against the deceased Defendant.

11. I will now turn to consider whether the applicant has shown that the Defendant's sons are in breach of the order of status quo. An application to commit a person to civil imprisonment for contempt of a court order is a serious matter and I adopt the observations made by **Lord Denning MR** in the case of **Re Bramblevale (1970) 1 ch.1 128 or (1969) 3 All E.R. 1062** stated thus

'' Contempt of court is an offence of a criminal character. A man may be sent to jail for it. It must be satisfactorily proved. To use the time honoured phrase, it must be proved beyond reasonable doubt''

cross J. put it differently in the case of **Re B (FA) an infant** (1965) ch. 112 at 1117

> **'' committal is a serious matter. The court must proceed very carefully before they make an order to commit to prison……''**

12. In our instant case the Defendant's sons aver that they were not parties to the suit and were also not aware of the court order. The question that comes to the fore is whether under those circumstances they can be held to be in disobedience of the order. I hold the view that although the court order said to have been disobeyed arises in civil proceedings, its disobedience is taken sufficiently seriously as to bring it within the realm of criminal law for purposes of punishment. The standard of proof as observed earlier should be beyond reasonable doubt and this is the standard to be discharged in this case before the Defendant's sons can legitimately be committed to civil jail. To the extent that the Defendant's sons incur personal criminal sanctions, personal service of the order on them is a condition precedent. This position is clear to me from general principles and from case Law. See the views expressed by the court of appeal in **Civil Appeal No. 198 of 1998, Loise Margaret Waweru Vs. Stephen Njuguna Githuri;**

> **'' if the order is to refrain from doing an act or requires a positive act to be done, evidence must be led to prove service on the respondent of the order alleged to have been disobeyed along with a penal notice''**

13. From the affidavit evidence presented before this court it is common ground that the Defendant's sons were not personally served with the order. There is also no evidence that although they were not personally served with the court order, they were aware of the contents of the order and being so aware, disobeyed it. There is no doubt in my mind that court orders are sacrosanct and must be obeyed and anybody who knowingly disobeys a court order in the process, undermines the justice system and portrays to court that it lacks the necessary clout to ensure compliance with its orders and such a person must surely be punished. See **Morris & Others v. Crown Office**(1970) 2QB 114 at 122, wherein **Lord Denning M.R** stated **'' …..of all places where law and orders must be maintained, it is here in these courts. The court of justice must not be deflected or interfered with. Those who strike at it strike the very foundations of our society''**

14. However, to commit a person to civil jail, it must be proved beyond reasonable doubt that they were personally served or had knowledge of the court order. In this case, I find that the applicant has failed to prove this to the requisite standard and I dismiss the notice of motion dated **11th November, 2011** with costs to the Defendant.

15.Having earlier found that this suit has abated, I am aware of the next step I should take but I restrain myself from doing so. I will instead invoke the inherent powers of the court under **section 3A** of the **Civil Procedure Act 2010** and give the plaintiff an opportunity to take the necessary step to revive the suit.

Dated, signed and delivered at Nakuru this 11th day of July 2014

L N WAITHAKA

JUDGE

PRESENT

Mr Waichungo for Moses Muchangi and Samuel Wanjohi

Both present in court

N/A for the plaintiff/Applicant

Emmanuel Maelo : Court Clerk

L N WAITHAKA

JUDGE