

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

ENVIRONMENT AND LAND CASE NO. 135 OF 2013

DR. MULIANGA EKESA

c/o OMUNDI BW'ONCHIRI ADV..... PLAINTIFF/APPLICANT

VERSUS

1. TALITIA DISTRICT HOSPITAL

2. FADDY MALABA DEFENDANTS/RESPONDENTS

RULING

1. The applicant herein had obtained by consent of the parties temporary orders of injunction from this court on 24th June 2013 restraining the defendants, their servants or agents from cutting or interfering with the trees on L.R. W. Bukusu/S. Mateka/970 pending hearing and determination of the application. That application was scheduled for mention on 9th July 2013. However during the pendency of that application, the defendant through his servants and/or agents uprooted some trees on the suit land compelling the applicant to commence contempt of court proceedings.

2. The application for contempt dated 9th April 2014 was filed and served on the defendant/respondent. The 2nd defendant/respondent in his replying affidavit at paragraph 11 admitted the trees were accidentally cut by the contractor while digging the foundation for the maternity wing. In paragraph 12 he deposes the trees were growing close to the edge of the portion on which the construction was being undertaken. In paragraph 14, he apologizes that the disregard to the court order was not intentional. In paragraph 15, he deposes the said accident has not caused the applicant any irreparable loss because the trees are mature and due for harvest just like the others being harvested.

3. The advocates for the parties somehow agreed that there was destruction to the trees but could not agree on the amount of compensation payable to the applicant. They agreed to submit on the value of the trees cut for the court to determine the quantum of damage payable to the applicant. Both submissions annexed reports prepared by the sub-county forest office. The applicant's report was dated 10th April 2014 prepared by the Bungoma sub-county forest officer. This officer gave the number of trees cut at 30 trees and total value at Kshs. 62,173.70/=. The respondent's report is dated 4th July 2014 prepared by the Bumula sub-county forest officer. This officer gave the number of trees cut @ 13 and value of the logs found on site at Kshs. 4,538.75/=. He also proposed a sum payable as general damages @ Kshs. 10,000/=. He proposed that the sum of Kshs. 14,538.75/= will adequately compensate the applicant.

4. The affidavit in support of the notice of motion application for contempt at paragraph 3, the applicant deposed that the trees were cut between 5th – 7th April 2014. The report prepared by the Bungoma sub-county forest officer on 10th April 2014 was made closely after the incident. What I find missing in his report is consideration/proposal for undoing the harm caused to the environment. The report by the respondent was made in July although done late, at least he recognized that the harm/damage to the environment cannot be quantified. In the application, the applicant is seeking the value for his trees only, he has failed to take into account harm caused to the environment.

5. In assessing the quantum of damage payable to the applicant, this court is alive to the fact that the greatest victim – the environment has no one to mitigate on her behalf. Both the forest officers in their reports failed to propose any mitigating actions to cater for reliability to the environment. The applicant's report failed to give basis on how he arrived at the value he attached to the trees cut. The respondent's report has referred to section 55 and 57 of the Kenya Forest Act 2005 and Kenya Forest Service General Order no. 260.

6. I have taken into consideration the provisions of the said sections, the reasons which occasioned the destruction, the provisions of article 70 of the Constitution as regards the protection of the environment and the reports presented to this court. I make a finding that both the applicant and the environment have suffered loss and merit compensation. Consequently I make the following orders;

(a). The defendant to pay the applicant Kshs. 40,000/= as compensation for the value of the trees cut within 21 days of the date of this ruling. I arrived on this figure by reaching a middle ground between the two reports.

(b). The defendant shall plant and nurture 20 trees within the area where the current trees were cut or if not possible at a site to be shown by the Bumula sub-county forest officer. The said exercise to be supervised by the Bumula sub-county forest officer.

(c). Costs of the application awarded to the applicant.

DATED and DELIVERED at Bungoma this 15th day of Oct. 2014

A. OMOLLO

JUDGE.