



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

HCC 192 OF 2011

MICHAEL ODERA.....PLAINTIFF

VERSUS

COMMISSIONER OF LANDS

THE ATTORNEY GENERAL

KISUMU TEACHERS' SACCO.....DEFENDANTS

RULING

1. This is a ruling on a Notice of Motion filed here on 3/10/2013 and dated the same. The motion is brought under Sections 1A, 1B, 3A and 63 (c) of Civil Procedure Act (Cap 21), Section 5 of Judicature Act (Cap 8), Order 40 Rule 3 of Civil Procedure Rules and all other enabling provisions of law.

2. Five (5) prayers are sought but at this stage, Prayer 1, which is for certifying the application urgent and hearing it exparte, is not for consideration. What is for consideration are prayers 2,3,4 and 5, which are as follows:

Prayer 2: that the Kisumu Teachers Sacco Manager Mr. Oganga should show cause why he should not be jailed for 6 months.

Prayer 3: That the order dated 19/12/2011 be effected and the status Quo be maintained in Parcel of Land No.1R 673&4 and L.R. NO.16344 and other parcels further restraining the 3rd defendant, his agents, employees, servants from interfering, trespassing, surveying, erecting beacons, destroying perimeter fences in the parcels pending hearing and determination of the suit.

Prayer 4: That the Kisumu Teachers Sacco Limited who is the 3rd defendant herein be denied audience for failure to obey court orders dated 19/12/2011

Prayer 5: That costs of this application be provided for.

3. The application is premised on the grounds that the 3rd defendant is disobeying court orders dated 19/12/2011; that the 3rd defendant is surveying, erecting beacons, destroying perimeter fence for 1R 67384 and L.R 16344, L.R.16345, L.R 15300 and L.R 15299 despite existing court orders; that the plaintiffs proprietary rights in Land Parcel No.67384, LR 16344, LR16345, LR 15300 and LR 15299 are affected despite the plaintiff's ownership of the parcels; that the 3d defendant is occasioning suffering to the plaintiffs; that the 3rd defendant is deliberately violating court orders and therefore interfering with the plaintiff's peaceful enjoyment of the said parcels of land.

4. In the supporting affidavit sworn by the applicant – **MICHAEL ODERA OTOM** – the order dated 19/12/2011 is referred to and its essence is stated as restraining the 3rd defendant, their employees, servants, agents, or representatives from encroaching, using, sub dividing, transferring or interfering with land parcel No. L.R.67384 and L.R No.16344 pending hearing and determination of the suit land.
5. The 3rd defendant is said to have violated that order because on or about 20/9/2013 it descended on parcels Nos.16344, 16345, and 15300 and started surveying, putting beacons and destroying perimeter fences. The 3rd defendant is said to have gone even further and encroached onto land parcels IR 67384, L.R 16344, LR 16345, L.R15300 and LR 15299.
6. The 3rd defendant was said to be duly served with the Court order but proudly confessed to have compromised the local police while at the same time trumpeting its ability to hire a top-notch Nairobi lawyer to steer the case in its favour.
7. The 3rd defendant was served, it was deponed, but wouldn't respect court orders and has instead gone on to conduct survey apparently under protection of police. The applicant therefore wants the 3rd defendant to be punished for contempt.
8. A replying affidavit was sworn on behalf of 3rd defendant, which is said to be the registered owner of IR NO.83689 a.k.a 16344. According to the deponent – Joseph Omollo Oganga – the 3rd defendant has all along been in possession of that land and has been carrying out activities to sub-divide it among its members.
9. Having been in possession, and having never abandoned it, no other person can purport to have taken over or subsequently possessed it, as the applicant seems to suggest.
10. Further, it was deponed that the 3rd defendant is aware of the order to maintain status Quo and has not violated that order.
11. According to the deponent, the 3rd defendant has not parted with possession or occupation or sold, leased or charged the land and has therefore maintained the status Quo as it was when the order was issued on 7/12/2011.
12. The replying affidavit also takes issue with the particulars of the parcel of land as given by the applicant. Parcel No.L.R 16344 goes with IR No.83689 while the applicant is stating it as going with IR 67384. Correctly put, IR No.67384 should go with L.R 16345.
13. It was stated that at no time had the 3rd defendant entered or interfered with or carried out activities in Grant No. L.R 67834 LR No.16345 and there was therefore no breach of the alleged court orders.
14. The replying affidavit filed by 3rd defendant elicited a further affidavit from the applicant. The applicant denied that the 3rd defendant is the registered owner of parcel No.16344. He further stated that the parcel goes with the larger L.R No. 67384 reflected in deed plan No.199281. But while the applicant denies that parcel No.16344 is not in 3rd defendants name, he concedes nevertheless that the parcel was fraudulently acquired by the 3rd defendant.
15. The occupation of 3rd defendant on parcel No.16344 is termed illegal. The applicant's family has build on it, it was deponed, and churches, Bridge of Hope Ministries International and African Gospel church, are on the land too with permission from the applicant.
16. The further affidavit reiterated that the 3rd defendant is in contempt since it has violated the order for maintenance of status Quo. It was further reiterated that the particulars of the land as given by the applicant are correct.

17. The application was argued before me on 10/2/2014. Mwamu for the applicant asked the court to find the 3rd defendant in contempt of Court orders. He asked the Court to see the photographic evidence availed and to note that despite service of the court order on 3rd defendant, it pulled down fences thus failing to comply with order.

18. Onsongo for the 3rd defendant asked the court to consider what the order was. He then answered that the order simply required the maintenance of Status Quo. According to Onsongo, the land is registered in 3rd defendant's name. The 3rd defendant is therefore on its own land and therefore, said Onsongo, that was the Status Quo.

19. Onsongo has raised the issue of service. He asked whether the order was served, and if it was, on who? The order was issued on 19/12/2011, Onsongo said, and purportedly served on 27/9/2013, which is about 2 years later. There was delay, Onsongo alleged.

20. And the manager of the 3rd defendant is not the one to be cited for contempt, Onsongo continued. The 3rd defendant is a body corporate and the Chairman, secretary or treasurer should be answerable for contempt, not the manager.

21. Mwamu responded to all this by saying that the activities of the 3rd defendant are in violation of the constitution. He said further that the 3rd defendant has not shown that the manager is not the one who conducts its business.

22. Many issues are raised by both sides and it seems to me that all things being equal, I would have to decide whether the Status Quo was maintained or not; Whether the particulars of the land as given are correct; whether the manager of the 3rd defendant was the one to be cited for contempt; whether service was done or not; whether there was delay in service if service was done; or whether the alleged activities of the 3rd defendant on the land would constitute contempt.

23. But a more pertinent issue concerns what was meant by maintenance of Status Quo. The order issued on 7/12/2011 in the relevant part states as follows:-

“The Status Quo obtaining in parcel of Land No.67384 and 16344 be maintained pending the hearing and determination of the suit”

It is useful to note here that the Status Quo as obtaining at the time is not spelt out. The dos and donts of each side in order to maintain the Status Quo are not stated. The specifics and parameters of the Status Quo are not mentioned.

24. In the circumstances, it appears to me that each side was left to decide and design its own meaning of the Status Quo meant to be maintained. And evidently, their understanding was manifestly different.

25. A look at paragraph 2 of the affidavit supporting the application shows that the order was essentially a restraining order forbidding the 3rd defendant and others through it from encroaching, using, selling, sub dividing, transferring or interfering with the land pending hearing and determination of the suit.

26. But according to paragraphs 8 and 9 of the replying affidavit, the 3rd defendant has not violated the order. It was in possession at the time of issuing the order and the order enjoined it not to part with possession, occupation, or sell, lease or charge, the land. It has not done any of this and it is therefore not in contempt.

27. It is plain in my view that there was no meeting of minds or consensus as to what the maintenance of the Status Quo entailed. To the applicant, maintenance of the status Quo meant a restraining order much like the prayer for restraining order – which is prayer 3 – in the applicant's application filed here on 1/11/2011 and dated 1/11/2011. But if that was the position I expect that there

would be another order showing that application as settled or conceded to. But there is no such order and the application is still pending. This then shows that it is doubtful whether the Status Quo meant what the applicant asserts.

28. When the 3rd defendant then comes up with its own understanding of what the order meant, it is not surprising.

29. And the resulting uncertainty is exactly where the problem lies. The uncertainty makes it difficult for me to hold the 3rd defendant's manager in contempt. The specifics, parameters and particulars of the Status Quo should have been clarified. A mere sweeping statement that Status Quo be maintained is not helpful. As things stand now, it is not easy to demonstrate contempt or lack of it.

30. All other issues I have pointed out are secondary. It is not necessary to consider them before the issue of the maintenance of Status Quo is settled. And as this issue can not be clearly delineated in the circumstances, I will not consider these issues.

31. The upshot is that the application herein cannot succeed. It is premised on an order that is lacking in clarity. Contempt of court requires a higher standard of proof than a mere balance of probabilities. A party alleging it, though not required to prove it beyond reasonable doubt, must nevertheless be prepared to demonstrate it beyond a balance of probabilities. The applicant herein falls far short of that proof. The application herein is therefore dismissed with costs.

A.K. KANIARU – JUDGE

7/10/2014

7/10/2014

A.K. Kaniaru – Judge

Dianga G. - Court clerk

3rd defendant – Present

Other parties – absent

Onsongo for 3rd defendant

M/s Langat for 1st and 2nd defendant

Mwamu for plaintiff/Applicant

Interpretation: English/Kiswahili

COURT: Ruling on application filed on 3/10/2013 read and delivered in open **COURT**.

Right of Appeal – 30 days.

A.K. KANIARU – JUDGE

7/10/2014