



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT KAKAMEGA**

**LAND & ENVIRONMENT CASE NO: 91 OF 2013**

**ODONGO ONDABA APELI.....1<sup>ST</sup> PLAINTIFF**

**OUCHO ONDABA APELI.....2<sup>ND</sup> PLAINTIFF**

**VURSES**

**STEPHEN OWINO APELI.....DEFENDANT**

**R U L I N G**

The application dated 20/8/2013 is seeking to punish the defendant for contempt of court. The applicant contends that this court issued orders on 5/6/2013 restraining the defendants from trespassing into plot **NORTH WANGA/MAYONI/721** and **722**. Despite the court orders the defendant ignored it and trespassed on the land saying court orders are mere papers. The application is supported by the affidavit of the 1<sup>st</sup> plaintiff sworn on 20/8/2013.

The defendant filed a replying affidavit sworn on 2/9/2013. The defendant denies ever trespassing on the suit land. The defendant denies that he was served with the court order and would like to have the process server cross examined.

There are also two other affidavits filed in reply to the application. **REMIGUS NGANYI WATIERI** swore an affidavit on 17/6/2014 indicating that he is the registered proprietor of plot number **NORTH WANGA/MAYONI/722** measuring 5.0 hectares having bought it from the original registered owner, **JAMEN M. ABDUDIKU**. He has annexed a copy of the green card and an official search. **KENNEDY MUKAVI HAJI** also swore an affidavit on 17/6/2014 indicating that plot number **NORTH WANGA/MAYONI/721** was sub-divided and he got plot number **N. WANGA/MAYONI/1684**. A copy of certificate of official search shows that the plot was sub-divided into three plots namely 1683- 1685 in 1998.

The main issue for determination has weather the defendant is disobeyed the court order. I have read the application and its supporting affidavit but there is no specific complaint that can make the court conclude that the defendant ignored the court order. When punishing a contemnor, what is being punished is the action that leads to contempt of court and not what the contemnor says. Whatever the contemnor says is his own opinion. He can criticize the order but he is supposed to obey it. The complainant ought to show that the contemnor did an act contrary to the order. The order restrained the defendant from trespassing on plots number 721 and 722. The applicant does not specifically indicate when the defendant trespassed.

I have perused the court record and noted that the orders were given ex-parte. Since the defendant had filed a replying affidavit, the court ought to have issued a formal ruling. The defence counsel was not present on 5/6/2013 when the orders were granted. Further, it is clear to me that the plaintiff's have no interest on plot number 722. The plot belongs to a third party who is not a party to this suit. As it stands the order relating to plot 722 is superfluous with regard to plot 721, there is evidence that the plot was inherited by the plaintiffs and their relative **MUSENJERI ONDABA APELI** who sold his share to **KENNEDY MUKAVI HEYI**. The land was sub-divided way back in 1998.

Given the pleadings herein I do find that there is no contempt of court by the defendant. I do further find that the order was erroneously granted and the same is hereby vacated. I do direct that this matter be referred to the Land and Environment court. Each party shall meet his own costs.

Dated, delivered and signed at Kakamega this 8<sup>th</sup> day of October 2014.

**SAID J. CHITEMBWE**

**JUDGE**