



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISII**

**ENVIRONMENT AND LAND CIVIL CASE NO. 324 OF 2013**

**JOYCE MOKEIRA MOMANYI ..... PLAINTIFF**

**VERSUS**

**MARTHA NYABOKE .....DEFENDANT**

**RULING**

1. The plaintiff brought this suit against the defendant on 23<sup>rd</sup> July, 2013 seeking; a declaration that, one, Francis Kerongo Anyona is the registered owner of all that parcel of land known as **LR No. Nyaribari Chache/B/B/Boburia/6729** (hereinafter referred to as “**the suit property**”), a permanent injunction to restrain the defendant by himself or through her agents servants or employees from in any way whatsoever entering, encroaching on or doing any other thing on the suit property and an order for the eviction of the defendant and the demolition of the structures that she has put up on the suit property.
2. Together with the plaint, the plaintiff brought an application by way of Notice of Motion dated 22<sup>nd</sup> July 2013 seeking an interlocutory injunction to restrain the defendant from entering, encroaching or carrying out any construction on the suit property pending the hearing and determination of this suit. The plaintiff’s application was heard inter partes and allowed on 1<sup>st</sup> November 2013. In the last paragraph of the ruling, I stated as follows;

**‘I will therefore grant the injunction sought in terms of prayer No.3 of the application. For the avoidance of doubt however, the injunction granted herein shall not stop the defendant from continuing with the construction of the building which is being put up on Plot No.6375. What is restrained is the construction of the septic tank on and any entry into or encroachment on the suit property whose boundary I have described above as extending from the area where the septic tank had been put up.’**

3. What is now before me is the plaintiff’s application by way of Notice of Motion dated 21<sup>st</sup> February 2014 brought under section 5 of the Judicature Act, Rules of the Supreme Court England and order 40 rule 3 of the Civil Procedure Rules in which the plaintiff has sought the following prayers;
  - i. **That the application be certified as urgent and heard on a priority basis.**
  - ii. **That the honorable court be pleased to make a finding that the respondent is guilty of disregarding and disobeying orders of this honorable court issued on the 1<sup>st</sup> day of November 2013.**
  - iii. **That the honorable court be pleased to cite, punish by committing the respondent to prison**

- for a period not exceeding six (6) months and/or have his property seized under sequestration for disobeying the lawful order issued on the 1<sup>st</sup> day of November 2013.**
- iv. That the honorable be pleased to order the respondent to remove the constructed sewer, temporary structures recently built and remove his iron sheets covering the applicant's portion of land.**
- v. That the respondent be condemned to pay costs of this application.**

The application was supported by the affidavit sworn by the plaintiff in which she averred among others that the respondent has completed the construction of a septic tank on the suit property which tank the plaintiff had complained about in his application for temporary injunction and the waste water from the storey building that the defendant has put up on her parcel of land is being emptied into the said tank. The plaintiff has averred further that the respondent has entered into and cultivated kales on the remaining portion of the suit property and has put up an iron sheet fence around the same.

4. The plaintiff averred further that it is clear from the photographs that she had presented to court while seeking a temporary injunction against the defendant that the defendant's storey building was put up on the defendant's own parcel of land but the defendant was in the process of putting up a septic tank on the suit property which was visibly vacant at the time. The plaintiff averred that after the court had issued the injunction order aforesaid, the defendant proceeded to put up temporary structures of timber on the suit property and to plant the kales aforesaid. In addition, the defendant proceeded with the building of the septic tank to completion. The plaintiff averred that the defendant has disobeyed the terms of the order of injunction issued herein on the 1<sup>st</sup> day of November 2013 and since court orders are not issued in vain, the defendant should receive appropriate sanction commensurable to her conduct.
5. The application was opposed by the defendant through affidavit sworn on 5<sup>th</sup> May, 2014 by one, Justus Magati Nyaberi who is the husband of the defendant herein. He averred that the photographs that are annexed to the plaintiff's affidavit in support of the application herein do not reflect the correct position on the ground. He admitted that he has planted *sukuma wiki (kale)* on the disputed property. He has admitted further that he has put up the fence complained of by the plaintiff so as to stop wandering goats from destroying his vegetables and to provide protection for the chicken he is rearing in his compound and the tenants residing on the storey building next to the suit property. He has denied that the order issued herein on 1<sup>st</sup> November, 2013 has been breached as claimed by the plaintiff. According to him, the plaintiff's application has been brought in bad faith. He contended that the septic tank that the defendant was in the process of putting up when the injunction was issued is still in the same state in which it was when the court stopped its construction. He denied that the construction of the said septic tank has been completed and that the waste of from the storey building is being discharged therein.
6. When the plaintiff's application came up for hearing on 8<sup>th</sup> July 2014, Mr. Ogari advocate appeared for the plaintiff while Mr. Sagwe advocate appeared for the defendant. Mr. Ogari submitted that the defendant is guilty of disobeying the order issued herein on 1<sup>st</sup> November 2013 and as such should be punished. In addition, Mr. Ogari submitted that the defendant should be ordered to remove forthwith the structures that she has put up on the suit property in defiance of the said court order. Mr. Ogari reiterated the contents of the plaintiff's affidavit in support of the application herein and submitted that the defendant has completed the construction of the septic tank that he had been restrained by the court from constructing on the suit property. Mr. Ogari demonstrated using the photographs annexed to the plaintiff's affidavit that the construction of the said septic tank has been completed and that the waste from the defendant's building standing next to the suit property is indeed being discharged into the said tank. Counsel submitted that contrary to the position that obtained when this suit was filed, the defendant is now using the whole of the suit property which is owned by the plaintiff.
7. Counsel referred the court to the photographs annexed to the plaintiff's affidavit which show that the defendant has planted vegetables on the portion of the suit property which was vacant as at the

- time this suit was filed and that the boundary of the suit property facing the road has been fenced off by the defendant using iron sheets. Mr. Ogari also referred the court to the photographs showing the temporary structures that the defendant had put up on the suit property for the purposes of rearing chicken. Counsel submitted that in the ruling that was delivered on 1<sup>st</sup> November, 2013, the court made a finding that the defendant's septic tank was falling within the suit property and as such it was not open for the plaintiff to continue with the construction thereof after the court had restrained the defendant from entering the suit property.
8. In conclusion, Counsel submitted that the defendant has not denied encroaching on the suit property. He submitted that the defendant has admitted; planting *sukuma wiki (kale)*, rearing chicken and putting up the iron sheet fence on the suit property. Counsel submitted further that the defendant has not denied knowledge of the order made herein on 1<sup>st</sup> November, 2013.
  9. On behalf of the defendant, Mr. Sagwe submitted that the defendant has placed before the court the structural plans for the septic tank which was to be constructed by the defendant. He submitted that the said plans show where the septic tank was to be put up and the fact that it has not been constructed to completion. Counsel reiterated that the only work that has been done in relation to the said tank was the digging of the hole which hole has been left open by the defendant. He submitted further that the said septic tank is in front of the defendant's building on the right hand side of the gate. Mr. Sagwe admitted however that the defendant has planted vegetables on the disputed property and has also put up a temporary structure thereon for rearing chicken. Counsel admitted further that the defendant has put up an iron sheet fence to prevent goats from accessing the said vegetables. Mr. Sagwe contended from the bar that the defendant is draining waste from her storey building next to the disputed property into a pit latrine that was in existence when this suit was filed. Mr. Sagwe denied the plaintiff's contention that the said pit latrine was put up after the injunction order had been issued. Mr. Sagwe reiterated that the plaintiff's application has been brought in bad faith and urged the court to disallow the same.
  10. I have considered the plaintiff's application together with the affidavit filed in opposition thereto. It is now settled that contempt of court proceedings are quasi criminal in nature because the contemnor is bound to lose his/her liberty if found guilty of the contempt complained of. In view of this, the standard of proof of contempt is higher than proof on a balance of probability. See the case of **Mutitika vs. Baharini Farm Ltd (1985) KLR 227** where the Court of Appeal stated that the standard of proof in contempt proceedings must be higher than proof on balance of probabilities and almost but not exactly, beyond reasonable doubt. For the plaintiff to succeed in her application, she has to satisfy the court to a degree beyond proof on a balance of probability that the defendant has disobeyed the order of the court issued herein on 1<sup>st</sup> November, 2013.
  11. As I have stated above, the said court order did not stop the defendant from continuing with the construction of the building which she was putting up on LR No. Nyaribari Chache/B/B/Boburia/6375 ("Plot No. 6375") which shares a boundary with the suit property but rather restrained the construction of the septic tank on and any entry into or encroachment on the suit property whose boundary was described as extending from the area where the septic tank was being put up. From the material on record it is not disputed that the defendant has planted vegetables on what the court had held to be part of the suit property. It is also not disputed that the defendant has put up temporary structures on the disputed property for rearing chicken and has reinforced the fence of the disputed property with iron sheets. There is also overwhelming evidence that the defendant has completed the construction of the septic tank that the court had found to be lying on the suit property. I am not persuaded by the defendant that the waste from the building standing on Plot No. 6375 is being discharged into a pit latrine. The photographs annexed to the plaintiff's affidavit leave no doubt that the waste drainage pipe from the said building is connected to the septic tank complained of which is complete with a breather pipe.
  12. From the wording of the order made herein on 1<sup>st</sup> November 2013, the defendant was stopped from constructing the said septic tank which was being constructed on the boundary of Plot No. 6375 and the suit property. The defendant was also stopped from entering into or encroaching onto the suit property. The order was directed against the defendant acting by herself or through her agents, servants or assigns. Justus Magati Nyaberi who has sworn the affidavit in response to the application herein is an attorney of the defendant under a power of attorney dated 9<sup>th</sup> August, 2013 that was donated to him by the defendant and filed herein on 22<sup>nd</sup> August, 2013 as an

annexture to the affidavit that he had filed in opposition to the injunction application. As an attorney of the defendant in these proceedings, whatever activities that the said Justus Magati Nyaberi carried out must be taken to have been carried out on behalf of the defendant. Justus Magati Nyaberi has admitted entering the disputed property and planting vegetables thereon. He has also admitted putting up temporary structure aforesaid and fencing off the property. He must be taken to have done all these on behalf of the defendant. For the purposes of contempt however, he becomes liable jointly with the defendant for the said acts.

13. From what I have set out herein above, I am satisfied that the plaintiff has proved that the defendant has breached the order issued herein on 1<sup>st</sup> November, 2013. I have noted however that the plaintiff neither extracted the said order nor caused it to be served upon the defendant formally. In the Court of Appeal case of **Mwangi H.C Wangondu –vs- Nairobi City Commission, Civil Appeal No. 95 of 1998** (unreported), it was held that;

**“...as a general rule an order of court requiring a person to do or abstain from doing any act may not be enforced unless a copy of the order has been served personally on the person required to do or abstain from doing the act in question. The copy of the order served must be endorsed with a notice informing the person on whom the copy is served that if he disobeys the order, he is liable to the process of execution to compel him to obey it. The requirement is important because the court will only punish as a contempt a breach of injunction if satisfied that the terms of the injunction are clear and unambiguous, that the defendant has proper notice of the terms and that the breach of the injunction has been proved beyond reasonable doubt.”**

14. It is clear from the foregoing that a person may not be punished for contempt of an order that was never served upon him. In the instant case, the defendant has contended that the plaintiff did not serve him with the order of injunction that was issued herein. This allegation was not contested by the plaintiff who neither annexed a copy of the extracted order nor the affidavit of service thereof upon the defendant. The defendant’s attorney Justus Magati Nyaberi however stated in his affidavit in reply to the application herein that although the said order was not served upon the defendant, he was aware of the same having obtained a copy of the ruling of the court. His contention was not that he was not aware of the terms of the said order but that the defendant had not disobeyed the same. In the case of **Mutitika –vs- Baharini Farm Ltd (supra)** it was held that;

**“A person who knowing of an injunction, or an order of stay, willfully does something, or causes others to do something, to break the injunction, or interfere with the stay, is liable to be committed for contempt of court as such a person has by his conduct obstructed justice.”**

15. The **defendant** having been aware of the order of injunction that was issued herein cannot escape court sanction for disobeying the said order merely because she was not served formally with the said order. I am fully in agreement with the decision of Lenaola J. in the case of **Basil Criticos Vs Attorney General and 8 Others [2012] eKLR** where he stated that :-

***“...the law has changed and as it stands today knowledge supersedes personal service.....where a party clearly acts and shows that he had knowledge of a Court Order, the strict requirement that personal service must be proved is rendered unnecessary”***

Romer L J in Hadkinson -v- Hadkinson (1952) 2 All ER 567 stated as follows at page 570 that:-

***“It is plain and unqualified obligation of every person against or in respect of whom an order is made by a court of competent jurisdiction to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void”***

16. Taking all the circumstances of this case into consideration, it is my finding that the defendant knowingly and willfully disobeyed the orders that were made by this Court on 1st November, 2013. I therefore find the defendant guilty of contempt of court. I would give the defendant opportunity to address me in mitigation before I pass sentence against her. In the meantime, the defendant shall remove within 14 days from the date hereof all the crops that she has planted on the suit property and the temporary structures that she has put up thereon. The defendant shall also remove the iron sheet fence that she has installed around the suit property. In addition, she shall henceforth decommission and cease using the septic tank that is situated in the boundary of the suit property and Plot No.6375 for discharging waste of any kind. This matter shall be mentioned within 21 days from the date hereof to hear the defendant in mitigation before her sentencing if she is not in court today. The Plaintiff shall have the costs of the application.

**Delivered, signed and dated at KISII this 14<sup>th</sup> of November, 2014.**

**S. OKONG'O**

**JUDGE**

**In the presence of:-**

Mr. Ochwang'i h/b for Ogari for the plaintiff

N/A for the defendant

Mr. Mobisa Court Clerk

**S. OKONG'O**

**JUDGE**