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REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT & LAND CASE NO. 27 OF 2012

BENSON MORANGA NYACHIO.....PLAINTIFF

VERSUS

RAPHAEL MUSYOKA MASILU..... DEFENDANT

RULING

1. The plaintiff brought this suit against the defendant on 17th December, 2012 seeking an order for the eviction of the defendant and/or any person using, cultivating or occupying all that parcel of land known as Kilgoris Majengo 64 (hereinafter referred to as “**the suit property**”) and a permanent injunction to restrain the defendant from interfering with the plaintiff’s quiet use, occupation and possession of the said property. The plaintiff claimed that the he is the owner of the suit property and that the defendant without any lawful excuse had trespassed on the same thereby interfering with the plaintiff’s

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use of the said property. The plaintiff claimed that he had protested against the defendant’s illegal occupation of the suit property but his protest was ignored by the defendant. Together with the plaint, the plaintiff filed an application by way of Notice of Motion dated 14th December, 2012 seeking a temporary injunction to restrain the defendant from interfering with the plaintiff’s quiet occupation of the suit property. I certified the application as urgent on 17th December, 2012 and ordered the plaintiff to serve the same upon the defendant for *inter partes* hearing on 27th December, 2012. On 27th December, 2012, the defendant did not appear in court. The defendant had also not filed a replying affidavit in response to the application. After satisfying myself that the defendant was served with the application, I allowed the plaintiff to proceed with the application in the absence of the defendant.

2. By a ruling delivered on 27th December, 2012, I allowed the Plaintiff’s application for injunction. The order was extracted

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on the same day and was duly signed by the Deputy Registrar and sealed with the seal of the court. The effect of the said order was to restrain the defendant by himself or through his agents, servants and/or employees from interfering with the Plaintiff's quiet occupation of the suit property. The extracted order had a penal notice warning those served with the same that if they disobey the same they risk being cited for contempt of court and may be jailed for up to six months in prison if found guilty.

3. The Notice of Motion application before me which is dated 23rd January, 2013 is seeking an order for the arrest and committal of the defendant to jail for a duration not exceeding six (6) months for disobeying the court order issued on 27th December, 2012. The said application is supported by the affidavit of the Plaintiff in which he has stated that the order issued herein was served upon the defendant on 28th December, 2012 through a court process server one, James

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Moracha Ntabo. The Plaintiff has stated further that the said order had directed that the defendant do vacate the suit property and that even after being served with the said order, the defendant still proceeded to enter the suit property. According to the Plaintiff, the defendant's entry into the suit property was in defiance of the said court order. The Plaintiff has annexed to his affidavit in support of the application, a copy of the affidavit of service by James Moracha Ntabo sworn on 16th January, 2013 in which he has deposed that he served the court order made on 27th December, 2012 upon the defendant on 28th December, 2017.

4. When the application came up for hearing before me on 10th April, 2013, the defendant did not appear in court. The Plaintiff filed an affidavit of service sworn by the same James Moracha Ntabo on 10th April, 2013, in which he deposed that he served the Plaintiff's contempt application upon the defendant on 24th January, 2013. After satisfying myself that the defendant had

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been served with the application, I allowed the Plaintiff's advocate to argue the application in the absence of the defendant. Mr. Mayaka, advocate who appeared for the Plaintiff submitted that the application was seeking an order to commit the defendant to civil jail for contempt of court. Counsel relied entirely on the grounds on the face of the application and the contents of the Plaintiff's affidavit in support of the application. Counsel submitted that the defendant has put up a permanent structure on the suit property in disobedience of the said court order after being served with the said order. Counsel submitted that the application was unopposed as the defendant was served with the application but filed neither grounds of opposition nor replying affidavit. Counsel prayed that the application be allowed as prayed.

5. It has been said over and over again that contempt of court proceedings are quasi criminal in nature because the contemnor is bound to lose his liberty if found guilty of the

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contempt complained of. In view of this, the standard of proof of contempt is higher than proof on a balance of probability. See holding in the court of appeal case of, **Mutitika-vs-Baharini Farm Ltd. (1985) KLR 227**, where the court stated that the standard of proof in contempt proceedings must be higher than proof on a balance of probabilities, and almost but not exactly, beyond reasonable doubt.

It follows therefore that for the Plaintiff to succeed in this application, the Plaintiff 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 27th December, 2012. As I have mentioned hereinabove, the said court order restrained the defendant from interfering with the Plaintiff's quiet occupation of the suit property. The said order did not direct the defendant to vacate the suit property as claimed in paragraph 2 of the Plaintiff's affidavit in support of the application. For the defendant to be guilty of disobedience of the said court order, the Plaintiff has to prove that the

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defendant had engaged in acts that would constitute interference with the Plaintiff's quiet possession of the suit property. In the grounds set out in the body of the application and in his affidavit in support of the application, the Plaintiff has accused the defendant of entering the suit property after being served with the said court order. It is not clear from the Plaintiff's affidavit as to what the defendant did after entering the suit property. The Plaintiff's advocate in his submission had stated that the defendant entered the suit property and constructed a permanent structure after being served with the court order. This submission is however not borne out either in the grounds on which the application has been brought or in the Plaintiff's affidavit in support of the application. Counsel's submission aforesaid therefore amounts to evidence from the bar which is not supported by pleadings. Due to the foregoing, it is not clear to me the nature of the contempt the defendant has committed. It is not clear when the defendant entered the

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suit property, what he went therein to do and what he did that would amount to interference with the Plaintiff's quiet possession of the suit property. I do appreciate that getting into the suit property without the defendant's permission would amount to trespass and that would be a breach of the court order. This ought however to have come out clearly from the Plaintiff's application as the court is being called upon to met out punishment which punishment must be proportionate to the offence committed by the defendant. I have noted that when the Plaintiff came to court for injunction, his complaint was that the defendant had assembled building materials on the suit property with a view to commencing construction thereon. It follows that, whereas the defendant's entry into the suit property to continue with the said construction works would amount to interference with the Plaintiff's possession of the suit property, his entry to remove the said materials after being served with the court order would not constitute contempt of

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the said court order. The defendant has not opposed the application and as such the content of the Plaintiff's affidavit in support of the application is not controverted. This does not however discharge the Plaintiff of the burden of proving the act of contempt complained of. For the reasons that I have given above, I am not satisfied that the Plaintiff has proved the charge of contempt against the defendant to the required standard. I think in the circumstances that it would be unsafe to find the defendant guilty of contempt at this stage. I am inclined to give the defendant another chance to clear himself of the charge leveled against him by the Plaintiff. In his application, the Plaintiff had sought an alternative prayer that the defendant be issued with a notice to attend court and show cause why he should not be punished for contempt of court. I think that this would be the most appropriate order to make in the circumstances. The Plaintiff has established a prima facie case of contempt against the defendant. The court feels however

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that the threshold for returning a verdict of guilty has not been met by the Plaintiff. Due to the fact that contempt of court is a threat to the rule of law and the administration of justice, allegations of contempt must be taken seriously. It is on this account that a court presented with a prima facie evidence of contempt which is not sufficient to find the alleged contemnor guilty should not shy away from summoning the alleged contemnor to appear before it to show cause why he should not be punished for contempt. This is more relevant where the application to punish for contempt is not defended like in this case. This will ensure that innocent persons are not punished while on the other hand persons who have actually disobeyed court orders are not let off the hook lightly something which may bring the court to disrepute. In the case of, **Mutitika-vs-Baharini Farm Ltd. (supra)**, it was also held that;

“the principle must be borne in mind that the jurisdiction to commit for contempt should be carefully exercised with the greatest reluctance and

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anxiety on the part of the court to see whether there is no other mode which can be brought to bear on the contemnor”.

I believe that this principle is well captured in the approach I have given to this application.

6. Due to the foregoing, I allow the Plaintiff’s application in terms of prayer (e) thereof. The Deputy Registrar should issue for service upon the defendant a notice to appear before this court on a date to be taken at the registry to show cause why he should not be punished for contempt of court. The Plaintiff shall have the costs of this application.

Dated, signed and delivered at KISII this 3rd day of July, 2013.

S. OKONG’O,

JUDGE.

In the presence of:-

No appearance for plaintiff

No appearance for defendant

Mobisa Court Clerk.

S. OKONG’O,

JUDGE.

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