



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT KITALE

ELC APPEAL NO. 7 OF 2019

CLEOPHAS AUKOR.....APPELLANT

VERSUS

LONGARIATUM LOYAPANGOLE.....1ST RESPONDENT

JOHN RAMON.....2ND RESPONDENT

(Being an Appeal against the Ruling of the Honourable M.N. Nafula, Senior Resident Magistrate delivered on 22nd August, 2019 in Kapenguria PMCC No. 11 of 2019)

RULING

1. The Appeal herein arises from the ruling delivered on the **22nd August, 2019** in **Kapenguria PMCC No. 11 of 2019**. The ruling was made pursuant to an application dated the **2/5/2019** in which the Appellant herein who was the plaintiff in the lower court, had sought for orders that the defendant be committed to civil jail for contempt orders of *status quo* issued by the court. The applicant had also sought for an order directing the O.C.S Kapenguria Police Station and/or D.C.I.O to visit the suit land and establish the extent of encroachment by the defendants/respondents.
2. The application was premised on the grounds that the trial court had issued orders on **31st August 2018**, which were to confine the parties herein to their respective parcels of land but that the defendants had continued to disobey the said orders.
3. In the supporting affidavit, the Appellant states that the two parcels of land in issue have clear and distinct boundaries but the respondents have continued with their acts of trespass.
4. The Appellant contends that the said application was dismissed and being dissatisfied with that ruling, he has appealed to this court vide a Memorandum of Appeal dated **28th August 2019** initially filed in Kapenguria High Court but later transferred to this court .
5. The Memorandum of Appeal sets out 5 grounds of Appeal which can be condensed into following grounds:-
 - (1) **That the learned trial magistrate misdirected herself in law and in fact when she held that the Respondents were not in contempt of Court orders.**
 - (2) **That the learned magistrate erred both in law and in fact when she disregarded the report filed by the O.C.S. and D.C.I.O regarding the extent of encroachment.**
 - (3) **That the learned magistrate erred both in law and in fact when she used extraneous matters and/or technical matters to dismiss the application.**
 - (4) **That the Ruling of the court was not based on the relevant legal provisions.**
 5. **That the learned magistrate erred in law and in fact when she ignored the annexed photographs which clearly demonstrated the nature of the encroachment.**
6. The Appeal proceeded by way of written submissions which the court has taken due consideration of. In his submissions, the Appellant contended that the defendants in their response dated **13/5/2019** to the application dated **2/5/2019** did not deny that the officers had found

that they had encroached upon the plaintiff's parcel of land. It was his contention that by dismissing the application simply because it did not have a penal notice, the court did not address itself to the issue whether the defendants/ respondents were in contempt of the court orders.

7. The appellant further stated that the court had failed to address itself to the site visit report. That the plaintiff had clearly demonstrated that the court orders of **31/8/2019** had been disobeyed. The appellant relied on the case of **Jacinta Njeru Kiatha Vs David K. Kanyiri (2015) eKLR**.

8. This being a first appeal, it is the duty of the court to re-evaluate the evidence, assess it and make its own conclusions (**See - Selle & Another vs. Associated Motor Boat Co. Ltd (1968)**.)

9. From the record, the trial court delivered a ruling with respect to an application dated **3/5/2018** on **31/8/2019** making the following orders at paragraph 3:

“...In the meantime, the application is declined, status quo be maintained”.

10. On the **6/6/2019**, a hand written report was produced to court pursuant to an earlier order ordering the police to visit the scene and establish the extent of encroachment.

11. It was thereafter that the appellant moved the trial court vide a Notice of Motion dated **2/5/2019** citing the respondents for contempt of court and the learned magistrate after hearing both parties delivered a ruling on **22/8/2019**. The appellant has therefore maintained that the learned magistrate erred by failing to commit the respondents to civil jail for disobeying the court orders which were to the effect of maintenance of the *status quo* with respect to the suit land. Thus this court has been called upon to intervene so as to ensure that the respondents do not go unpunished.

12. The rule of law requires that orders of the court be obeyed in order to protect the dignity and authority of the court process.

13. Section 10 of the Magistrates' Courts Act empowers magistrates to punish for contempt of court. **Section 10 (1) of the Magistrates' Courts Act** provides as follows:-

“Subject to the provisions of any other law the court shall have power to punish for contempt.”

14. The Section provides as follows at **Section 10(3)**:-

“10(3) In the case of civil proceedings, the willful disobedience of any judgment, decree, direction, order, or other process of a court or willful breach of an undertaking given to a court constitutes contempt of court”.

15. The burden of proof in my view lay with the applicant/appellant to demonstrate to the court that the Respondents disobeyed the orders of this court. I have had the occasion to peruse the report by the police and it is clear that there was encroachment. The salient issue that arose from that report was whether or not there was a breach of the court order. It is quite apparent that the Learned Magistrate failed to apply her mind to the report in her ruling dated **22/8/2019**. This mission is fatal to the Ruling for it is the court that had issued an order compelling a site report. It could proceed as though the report did not exist thereafter. In this court's opinion, that report, taken in conjunction with the contents of the applications, affidavits and the pleadings may (and I used the word “*may*” very deliberately) have led the trial court to a different finding in the Ruling appealed against.

16. For the above reasons, I allow the appeal and set aside the order dismissing the application dated **2/5/2019**. The respondents shall bear the costs of this Appeal jointly and severally. In addition, the civil suit **Kapenguria PMCC No. 11 of 2019** is hereby transferred to Kitale Chief Magistrate's court for the hearing *de novo* of the application dated **2/5/2019** and also the hearing and disposal of the main suit. I also hereby issue a guideline that in trying the issue of contempt in the application dated **2/5/2019**, the police report submitted to court shall be considered.

It is so ordered.

Dated, signed and delivered at Kitale via electronic mail on this 1st day of October, 2020.

MWANGI NJOROGE

JUDGE, ELC, KITALE.