



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 180 OF 2016

WILLY MWOLOLO MUINDI.....PLAINTIFF/APPLICANT

VERSUS

KASYOKA MBITHI NDUVA.....DEFENDANT/RESPONDENT

RULING

1. In the Notice of Motion dated 28th July, 2020, the Plaintiff has sought for the following orders:

- a. An order of committal to be made against Kasyoka Mbithi Nduva the Defendant herein, his servants, agents and/or persons claiming under him to prison for such period as this Honourable Court may deem fit and just in that the said Kasyoka Mbithi Nduva by himself, his servants, agents and/or persons claiming under him have disobeyed the orders made herein by this Honourable Court on the 5th day of July, 2019 restraining him and/or his servants or persons claiming under him from encroaching, trespassing, grazing, occupying or in any manner whatsoever from interfering with L.R. No. Muputi/Kimutwa/226.*
- b. An order that costs of and occasioned by this Motion be paid by the said Kasyoka Mbithi Nduva.*
- c. Any other order which the Honourable Court may deem expedient in the circumstances.*

2. The Application is supported by the Affidavit of the Plaintiff who has deponed that on 5th July, 2019, this court allowed his claim by way of a Judgment; that the Decree of this court was issued on 26th September, 2019 and that the said Decree was duly served upon the Defendant.

3. The Plaintiff deponed that despite the Defendant having been served with the Decree, the Defendant has blatantly refused to comply with the orders of the court; that in a bid to circumvent the orders of the court, the Defendant sought to involve the Assistant Chief for assistance and that the Defendant has been encroaching, grazing, trespassing and putting to waste land parcel number Muputi/Kimutwa/226.

4. According to the Plaintiff, he has on more than one occasion reported the illegal acts by the Defendant to the Konza Police Post and that despite the said reports, no action has been taken by the police officers based at the Konza Police Post.

5. Although the Defendant was served with the Application, he did not oppose it. Indeed, the Application proceeded for hearing as unopposed. The Plaintiff relied on his Affidavit and the annexures.

6. As was held in the case of *Katsuri Limited vs. Kapurchand Depar Shah [2016] eKLR*, where the liberty of the subject is or might be involved, the breach for which the alleged contemnor is cited must be precisely defined. The court went further to hold as follows:

“A contempt of court is an offence of a criminal character. A man may be sent to prison. It must be satisfactory proved. It must be higher than proof on a balance of probabilities, almost, but not exactly, beyond reasonable doubt. The standard of proof beyond reasonable doubt ought to be left where it belongs, to wit, in criminal cases. It is not safe to extend it to contempt.”

7. The grounds to be proved in contempt proceedings, according to *G. Bonnie and N. Lowe, “The Law of Contempt” 4th Edition, London Butterworth’s, 2010, P.129* are:

- a) The terms of the order (or injunction or undertaking) were clear and unambiguous and were binding in the Respondent;*
- b) The Respondent had knowledge of a proper notice of the terms of the order;*

c) The Respondent has acted in breach of the terms of the order; and

d) The Respondent's conduct was deliberate.

8. The record shows that on 5th July, 2019, this court allowed the Plaintiff's claim in the following terms:

"1. That a permanent order of injunction be and is hereby issued restraining the Defendant and/or his servants or persons claiming under them from encroaching, trespassing, grazing, occupying or in any manner whatsoever from interfering with L.R. No. Muputi/Kimutwa/226."

9. The Affidavit of Service of Jacob M. Muthenya shows that the Defendant was served with the Decree of this court on 20th December, 2019. Indeed, the Defendant has not denied that he was personally served with the Decree.

10. The Defendant has also not denied that despite being served with the Decree of the court on 20th December, 2019, he continued trespassing on the suit property. To prove that the Defendant trespassed on the suit property after service of the Decree on him, the Plaintiff exhibited photographs showing cattle grazing on the suit property.

11. The Plaintiff has also annexed on his Affidavit the extracts of the Occurrence Book (OB) reports that he made to Konza Police Post on 31st March, 2020, 26th April, 2020 and 8th April, 2020 in respect of the Plaintiff's defiance of the Decree of the court.

12. Having not controverted the Plaintiff's allegations that he has disobeyed the Decree of the court, and in view of the photographs annexed on the Plaintiff's Affidavit showing the grazing being undertaken on the suit property, it is my finding that the Defendant has disobeyed and continues to disobey the orders of this court made on 5th July, 2019 and served on him on 20th December, 2019.

13. For those reasons, I allow the Application dated 28th July, 2020 as follows:

a. The Defendant is hereby found to be in contempt of the Decree of this court of 5th July, 2019 and issued on 26th September, 2019.

b. The Police officer in charge of Konza Police Post to arrest the Defendant and present him in this court for mitigation and sentencing.

c. The Defendant to pay the costs of the Application.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 20TH DAY OF NOVEMBER, 2020.

O.A. ANGOTE

JUDGE