



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA

ELC CASE NO. 110 OF 2012

(formerly Bgm High Court Civil Case No. 102 of 2010)

JOEL FURUKHA.....PLAINTIFF

VERSUS

ALFRED MURESIA.....1ST DEFENDANT

PETER JUMA WAFUBWA.....2ND DEFENDANT

RULING

On 31st July 2018 and pursuant to the plaintiff's application dated 23rd January 2017 which was not opposed, I granted an order compelling the **LAND REGISTER** and **LAND SURVEYOR BUNGOMA COUNTY** to reinstate the boundary to the land parcels **NO BOKOLI/CHWELE/1818** and **1819**. I also directed that the **OFFICER COMMANDING CHWELE POLICE STATION**, the **ASSISTANT COUNTY COMMISSIONERS CHWELE AND BOKOLI DIVISIONS** or officers delegated under their command to provide security where necessary. That order was made in the presence of **MR WEKESA** holding brief for **MS CHUNGE** for the plaintiff and **MR AMANI** holding brief for **MR KUNDU** for the 1st defendant.

I am now seized of the plaintiff's Notice of Motion dated 17th November 2019 seeking the following orders: -

- 1. That this Honourable Court be pleased to order for the arrest, fine, imprisonment for a period of 6 months of the 1st defendant for contempt of Court orders.**
- 2. That the costs of this application be provided for by the 1st defendant.**

The application is premised on the grounds set out therein and is also supported by the affidavits of **JOEL FURUKHA** (the plaintiff herein) as well as **MILTON MATUMBAI**, **MARTIN WAFULA FURUKHA** and **ROBERT SIMIYU FURUKHA**. Annexed to the said supporting affidavits are several annexures including this Court's order issued on 31st July 2018, a letter dated 8th October 2019 from **MR SIMIYU W. AMOS** the **COUNTY SURVEYOR BUNGOMA** and **MUTATION FORMS**.

The gist of the application is that pursuant to the orders of this Court dated 31st July 2018, the **LAND REGISTRAR AND SURVEYOR BUNGOMA** visited the site to reinstate the boundaries between parcel **NO BOKOLI/CHWELE/1818** belonging to the plaintiff and parcel **NO BOKOLI/CHWELE/1819** belonging to the 1st defendant. The **COUNTY SURVEYOR MR SIMIYU W. AMOS** thereafter prepared a report dated 8th October 2019 (annexture JF 2). The plaintiff and his workers then started reinforcing the said boundary by fencing it off but the 1st Respondent, in total disregard of this Court's orders, mobilized his sons and several youths who, armed with rungas and pangas, forcefully stopped the exercise. This made the plaintiff and his workers take off in fear that a quarrel would ensue. The boundary markings and beacons placed by the surveyor have been interfered with and no longer exist. This conduct on the part of the 1st defendant is not only criminal but is also in disobedience of the order of this Court.

The application is opposed and the 1st defendant **ALFRED MURESIA WAFUBWA** in his replying affidavit dated 21st February 2020 has deponed, inter alia, that indeed on 21st August 2019, the **LAND REGISTRAR** and the **LAND SURVEYOR BUNGOMA** in the company of Police Officers visited the scene and established the boundary between the land parcel **NO BOKOLI/ CHWELE/1818** and **1819**. That the exercise went on peacefully. Thereafter, the parties were to meet on 27th August 2019 to discuss whether the plaintiff could sell the land parcel **NO BOKOLI/CHWELE/1818** to the 1st defendant. However, the plaintiff did not turn up as he was unwell. Nonetheless, a price of Kshs. 550,000/= was negotiated and further meetings were to be held. The 1st defendant is therefore surprised that he was hostile towards the plaintiff adding that he is a law-abiding citizen and has never engaged in criminal activities. That both the **OFFICER COMMANDING CHWELE POLICE STATION** and the **CHIEF** can confirm that there was no hostility. That this application is actuated by malice and the

boundary is still intact.

The 2nd defendant herein **PETER JUMA WAFUBWA** filed a replying affidavit dated 26th February 2020 in which he associated himself with the averments contained in the plaintiff's supporting affidavit.

The application has been canvassed by way of written submissions. The same have been filed by **MS CHUNGE** instructed by the firm of **ELIZABETH CHUNGE & COMPANY ADVOCATES** for the plaintiff and by **MR MAKOKHA** instructed by the firm of **MAKOKHA, WATTANGA & LUYALI ADVOCATES** for the 1st defendant.

I have considered the application, the rival affidavits and the submissions by counsel.

The application is anchored upon the provisions of **Section 1, 1A, 1B, 3, 3A, 63(e)** and **Order 40 of the Civil Procedure Rules** as well as any other provisions and powers of the law. The orders issued by this Court on 31st July 2018 and which are the subject of this application were not interlocutory injunctive orders. Therefore, the provisions of **Section 63(e) of the Civil Procedure Act** or **Order 40 of the Civil Procedure Rules** do not apply.

Section 3A of the Civil Procedure Act however provides for the inherent jurisdiction of this Court. It provides: -

“Nothing in this Act shall limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.”

Those powers have of course now been reinforced by the introduction of **Sections 1A and 1B of the Civil Procedure Act** as well as **Article 159 of the Constitution**. In **KENYA POWER & LIGHTING COMPANY LTD.V. BENZENE HOLDINGS LTD T/A WYCO PAINTS C.A CIVIL APPEAL No 132 of 2014**, the Court of Appeal cited with approval the following passage from **HALBURY'S LAWS OF ENGLAND 4TH EDITION VOL 37** paragraph 14: -

“The inherent jurisdiction of the Court enables it to exercise control over its process by regulating its proceedings, by preventing the abuse of the process and by compelling the observance of the process In sum, it may be said that the inherent jurisdiction of the Court is a virile and viable doctrine and has been defined as being the reserve or fund of powers, a residual source of powers which the Court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them.”

My understanding of the 1st defendant's replying affidavit is that whereas he confirms that the boundary between his land parcel **NO BOKOLI/CHWELE /1819** and the plaintiff's land parcel **NO BOKOLI/CHWELE/1818** were indeed re – established by the **BUNGOMA LAND REGISTRAR** and **SURVEYOR** in an exercise conducted on 21st August 2019, he has not interfered with it and that it is ***“still intact.”*** The plaintiff's case is that infact after the said boundary had been re – established and while he and his workers were reinforcing the said boundary by fencing it off using poles and barbed wire shortly after the land's officers had left, the 1st defendant ***“in total disregard disobedience, violation contravention and contempt of the Court orders herein mobilized his sons and several youths armed with runigus and pangas notwithstanding that the Court order herein is still in force, forcefully through intimidation and threats stopped the said exercise of reinforcing the restituted boundary.”*** (paragraph 11). Plaintiff adds as follows in paragraph 12 of the supporting affidavit.

12 “That at all material times the boundary markings and beacons that had been marked by the Lands officers and placed by ourselves have been interfered with and nothing shows that there is a boundary differentiating the two parcels of land something that has been caused by the respondent and his agents”

In rebuttal however, the 1st defendant has deponed in paragraphs 12, 13 and 14 of his replying affidavit as follows: -

12: “That I am a law-abiding citizen and at no time can I engage in criminal activities.”

13: “That the OCS CHWELE POLICE STATION and the area CHIEF who were present on the scene can confirm that there was no hostility towards the plaintiff and or his people.”

14: “That the application is actuated by malice and other ulterior motives of trying to punish me for something that I have not done.”

I have no doubt in my mind that the **BUNGOMA LAND REGISTRAR** and **SURVEYOR** re – established the boundaries between land parcels **NO BOKOLI /CHWELE/1818** and **1819** as ordered by this Court. Their report dated 8th October 2019 is clear on that. The 1st defendant confirms in paragraph 13 of his replying affidavit that there was no hostility towards the plaintiff during that exercise. Certainly, there could not have been any disturbance on 21st August 2019 when the exercise was carried out because the Police and Chief were present. The plaintiff's case is that after those officers had left, the 1st defendant jointly with his armed sons and some youth interfered with the ***“boundary markings and beacons that had been marked by the lands officers.”***

Counsel for the 1st defendant has submitted that contempt of Court is a serious matter and proof ***“must be beyond reasonable doubt.”*** It cannot be disputed that contempt of Court is a serious matter.

In RE – BREAMBLEVALE LTD 1969 3 ALL. E. R 1062, LORD DENNING described it thus: -

“Contempt of Court is an offence of a criminal character. A man may be sent to prison for it To use the time honoured phrase, it must be proved beyond reasonable doubt”

The Court of Appeal however said as follows with regard to the standard of proof in contempt of Court in **MUTITIKA .V. BAHARINI FARM LTD 1985 KLR 229**: -

“In our view, the standard of proof in contempt proceedings must be higher than proof on the 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 an offence which can be said to be quasi criminal in nature.”

Even without elevating the standard of proof of contempt in civil cases to the standard set by **LORD DENNING** in **RE – BREAMBLEVALE LTD** (supra), it is clear that proof of contempt of Court in civil cases such as this one has been accepted in this country to be higher than on a balance of probabilities but not beyond reasonable standard.

It is not in dispute that on 31st July 2018, this Court issued the orders sought by the plaintiff that the **LAND REGISTRAR AND LAND SURVEYOR BUNGOMA** reinstate the boundary between parcels **NO BOKOLI/CHWELE /1818** and **1819**. That order was made in the presence of Counsel for both parties and there can be no suggestion that the same is ambiguous or was not known to either of the parties.

The 1st defendant’s evidence, as I have already indicated above, is that this **“application is actuated by malice and other ulterior motives.”** However, in support of the plaintiff’s application is the 2nd defendant’s **“replying affidavit”** dated 26th February 2020. In that affidavit which should have been a supporting affidavit and not a replying affidavit, the 2nd defendant depones in paragraphs 4 and 5 as follows: -

4 “That I agree with the sentiments and averments of the Applicant’s affidavit dated the 1st November 2019 and wish the Court to take the averments therein as mine in respect of the chronology of the events that took place.”

5 “That I swear this affidavit to support the averments made above and request the Honourable Court to take the necessary step to warn the 1st defendant who is disregarding Court orders”

The contents of the 2nd defendant’s affidavit were not contested and there is nothing to suggest that he was **“actuated by malice”** or any ill motive against the 1st defendant when he swore that affidavit. That affidavit essentially corroborates the plaintiff’s averments that the boundary markings placed by the **LAND REGISTRAR** and **SURVEYOR** have been interfered with by the 1st defendant and his agents and the boundary between land parcels **BOKOLI/CHWELE/1818** and **1819** no longer exists. That is proof of contempt.

Interference with a boundary feature is a criminal offence and **Section 21 (1)** of the **Land Registration Act** provides for a penalty of imprisonment for a term not exceeding 2 years or a fine not exceeding Kshs. 200,000/= or both. **Section 29** of the **Environment and Land Court Act** on the other hand provides that: -

“Any person who refuses, fails or neglects to obey an order or directions of the Court given under this Act, commits an offence, and shall, on conviction, be liable to a fine not exceeding one million shillings or to imprisonment for a term not exceeding two years, or to both.”

The above provisions illustrate how important it is to obey Court orders. That the boundary between parcels **NO BOKOLI/CHWELE/1818** and **1819** was re – established is confirmed by the letter 8th October 2019 addressed to the Deputy Registrar Bungoma by **MR SIMIYU W. AMOS**. The first paragraph thereof reads as follows: -

“RE: REPORT ON THE MATTER OF LAND BOKOLI/CHWELE /1818 & 1819 AND IN THE MATTER OF BUNGOMA H.C ELC NO 110 OF 2012

Pursuant to the Court order dated 25.10.2018 issued to our office, we proceeded to the disputed common boundary between land reference numbers BOKOLI/CHWELE/1818 and 1819 and re – established the boundaries.”

That the boundary was re – established is not really an issue. The 1st defendant’s case, as I have already stated above, is that he did not interfere with it. However, believing the plaintiff’s averments as I do and which have been corroborated by the 1st defendant’s own co – defendant, I have no reasons to doubt the veracity of the plaintiff’s assertions. The 1st defendant’s Counsel has referred this Court in his submissions to the provisions of **Section 107 of the Evidence Act** on the need of the plaintiff to prove that allegation of contempt. Taking the totality of all the evidence herein, I am satisfied that the plaintiff has met that standard. It is also not lost to this Court that by a further supporting affidavit dated 23rd February 2020, the plaintiff annexed thereto a letter dated 21st May 2019 addressed to the **COUNTY LAND REGISTRAR BUNGOMA** by the 1st defendant’s then Counsel **MR J. S. KHAKULA**. In paragraphs two and three of the said letter, Counsel writes as follows which is relevant to this application: -

“Dear Sir

PROPOSED VISIT TO LAND PARCELS NO BOKOLI/CHWELE/1818 AND 1819 ON 23.5.2019.

We act for ALFRED MURESIA who has shown us your notice of determination of disputed boundary dated 8th May 2019 with instruction to write to you as follows: -

There is no boundary that you can determine. Land parcels BOKOLI/CHWELE/1818 and 1819 do not exist. Titles BOKOLI/CHWELE/1818 and 1819 were cancelled by the BUNGOMA CHIEF MAGISTRATE'S COURT on 19.12.2008. A copy of the order in BUNGOMA CMC LDT NO 26 of 2008 issued on 3rd April 2009 cancelling the titles is attached for your easy reference. The order was executed and the original title BOKOLI/CHWELE/944 which gave rise to these numbers reinstated. A copy of Certificate of official Search for BOKOLI/CHWELE/944 dated 26th March 2013 is also enclosed for your easy reference.

Since there is no order reinstating titles 818 and 819, your proposed visit would be in vain. Our client will not attend. Such visit will not determine anything.

Yours faithfully

for J. S. KHAKULA & COMPANY

ADVOCATES.”

The contents of that letter written on the 1st defendant's instructions and coming almost for (4) years after the Judgment by **MUKUNYA J** dated 2nd December 2015 and one (1) year after this Court's orders issued on 31st July 2018 paint the picture of the 1st defendant as a party who had no intention of complying with either the Judgment dated 2nd December 2015 or any other orders or directions by this Court.

The Court of Appeal stated the following on contempt proceeding in **SHIMMERS PLAZA LTD .V. NATIONAL BANK OF KENYA LTD 2015 eKLR: -**

“We reiterate here that Court orders must be obeyed. Parties against whom such orders are made cannot be allowed to trash them with impunity. Obedience of Court orders is not optional, rather, it is mandatory and a person does not choose whether to obey a Court order or not The Courts should not fold their hands in helplessness and watch as their orders are disobeyed with impunity left, right and centre. This would amount to abdication of our sacrosanct duty bestowed on us by the Constitution. The dignity and authority of the Court must be protected, and that is why those who flagrantly disobey them must be punished lest they lead us all to a state of anarchy.”

It has been stated time and again that the Court's powers to punish for contempt are not meant to protect the personal dignity of the Judge or Magistrate but rather, they are meant to protect the fundamental supremacy of the rule of law. See for instance **WOBURN ESTATE LIMITED .V. MARGARET BASHFORTH 2016 eKLR**. That explains why **Section 3A of the Civil Procedure Act** also donates to Courts the inherent jurisdiction to make such orders that are necessary to prevent abuse of its process. Therefore, the power to punish for contempt is intended to uphold – hold the dignity of the judicial process by ensuring that Court orders and directions are complied with. That is why the Court's powers to regulate its power and processes is inherent and notwithstanding the fact that the **CONTEMPT OF COURT ACT** was declared unconstitutional, **Section 5 of the Judicature Act** and the common law principles still apply to enable Court deal with contemnors because Court orders are not made in vain. That is why in **HADKINSON .V. HADKINSON 1952 ALL E. R 567, ROMER L.J** stated thus:-

“It is the plain and unqualified obligation of every person against or in respect of whom an order is made against 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.”

Having considered all the issues herein, I am satisfied that the plaintiff has proved as required in law that the 1st defendant is in contempt of the orders dated 3rd July 2018.

Summons to issue to the 1st defendant to appear before this Court on 10th December 2020 for further orders. The same to be served by the Court.

Boaz N. Olao.

J U D G E

19th November 2020

Ruling dated, delivered and signed at **BUNGOMA** this 19th day of November 2020. The same is delivered by way of electronic mail in keeping with the **COVID – 19** pandemic guidelines.

Boaz N. Olao.

J U D G E

19th November 2020