



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU

E.L.C. CASE NO. 64 OF 2017 (ORIGINATING SUMMONS)

ANDREW NGARI KAUMBUTHU.....PLAINTIFF

VERSUS

MOSES GACHOKA NJUGUNA.....DEFENDANT

AND

ZERBANSON MWANIKI KIRINGA

EDWARD NDERI

PETERSON NEWTON MUCHIRI NJERU

(Being sued as the Board members of ACK ST

EMMANUEL CIANTHIA SECONDARY SCHOOL).....ALLEGED CONTEMNORS

RULING

1. By a notice of motion dated 17th May 2018 and amended on 6th June 2018 brought under the provisions of **sections 4, 6, 27 and 28 of the Contempt of Court Act, sections 63 (e), 1A, 3, 3A of the Civil Procedure Act, Order 40 Rules, 3 and 4, Order 51 Rule 1 of the Civil Procedure Rules**, the Plaintiff sought the following orders;

a. That this application be certified as urgent in the 1st instance.

b. That this honorable court be pleased to enjoin Peterson Newton Muchiri Njeru (being sued as the board members of ACK Emmanuel Ciantia Secondary School) as contemnors in this suit.

c. That the court be pleased to determine that the contemnors are in contempt of the orders of this court granted on the 22nd February 2018.

d. That the court be pleased to punish the contemnors by imprisonment for six months or as the court may deem fit attaching their assets to compensate the Plaintiff for the loss suffered as a result of the contempt or in the alternative demand that contempt is purged and or they pay a maximum fine of Ksh 200,000/-.

e. That this honourable court do issue any other or further orders of the court geared towards protecting the dignity and authority of the court.

f. That the Respondent be condemned to pay the costs of this application.

2. The said application was based upon the various grounds set out on the face of the motion the gist of which was that the Defendant and the alleged contemnors had disobeyed the order of injunction dated 22nd February 2018.

3. The application was supported by the affidavit sworn by the Plaintiff on 17th May 2018 and the annexures thereto. It was stated in the said affidavit that the alleged contemnors were served with the order of injunction on 5th March 2018 after they threatened to invade the suit property. It was alleged that the alleged contemnors had cut down trees and grass on the suit property hence the Plaintiff wanted them punished for contempt of court.

4. The Principal of ACK St Emmanuel Cianthia Secondary School (hereinafter the *school*) filed a replying affidavit on 20th July 2018 on behalf of the Board of Management in opposition to the said application. He stated that the school purchased the suit property from the Defendant in 2016 whereupon it took possession of the land and fenced it off as part of the school compound. It was further stated that the suit property was cultivated with agricultural crops by the 2018 KCSE candidates for the KCSE national examinations. Any trespass upon or invasion of the suit property was, therefore, denied.
5. The court has also noted that the Defendant filed grounds of objection dated 19th June 2018 to the Plaintiff's said application. It was contended that the hearing date of 28th June 2018 was not convenient and that the prayer seeking to have the Defendant pay the costs of the application was misconceived since he was not alleged to have disobeyed any court order.
6. When the said application was ultimately listed for hearing on 25th July 2018 Mr Mugendi the advocate on record for the Plaintiff sought leave to file a further affidavit within 7 days. Mr. Siro for the Attorney General for the alleged contemnors did not oppose the Plaintiff's request but sought to have his preliminary objection contained in the replying affidavit also canvassed simultaneously with the hearing of the Plaintiff's said application. The court thereupon directed the Plaintiff to file and serve his further affidavit and written submissions on both the preliminary objection and the application for contempt within 30 days. The Attorney General was directed to file and serve his submissions on both the preliminary objection and application for contempt within 30 days upon service by the Plaintiff. By the time of preparation of this ruling, however, none of the parties had filed their submissions. The Plaintiff was also yet to file a further affidavit.
7. The court has not seen a separate notice of preliminary objection filed on behalf of the Attorney General. However, the replying affidavit of the principal of the school filed on behalf of members of the Board of Management contains the technical objections to the Plaintiff's said application. First, it is contended that the proceedings are contrary to the **Government Proceedings Act (Cap 40)** and in that an order of injunction was issued in contravention of **Order 29 Rule 2 of the Civil Procedure Rules** which bars the issuance of an order of injunction against the government. However, since the Attorney General did not submit on the matter, the court deems the preliminary objections as having been voluntarily abandoned.
8. The main question for consideration is whether the Plaintiff has proved the alleged contempt against members of the Board of Management of the school. It must be remembered that neither the school nor its Board of Management was made a party to the suit or application for injunction in which the interim order dated 22nd February 2018 was granted. The members of the Board of Management were simply brought on board through the application for contempt. They were, therefore, not accorded an opportunity of being heard on the application for injunction and of giving their version of facts.
9. In the case of **Mutitika Vs Baharini Farm Ltd [1985] KLR 227**, the Court of Appeal of Kenya expressed the standard of proof for contempt of court as follows;
- “We agree with Mr. Khaminwa’s submissions in this respect. 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. We envisage no difficulty in courts determining the suggested standard of proof...”**
10. The court has considered the Plaintiff's said application amended on 6th June 2018 as well as the replying affidavit by the school in opposition thereto. The court is far from satisfied that the Plaintiff has demonstrated the contempt against the alleged contemnors for the following reasons. First, it would appear that the school was already in possession of the suit property or part thereof at the time the order of 22nd February 2018 was granted. This is evident from the contents of the replying affidavit which indicated that the school took possession in 2016 and fenced off the suit property as part of the school compound. The Plaintiff did not file a further affidavit to demonstrate otherwise. In those circumstances, a party in possession could not be validly restrained from taking possession or utilizing such land.
11. The second reason is that the photographs exhibited by the Plaintiff do not support his allegation that the trees were cut after issuance of the interim injunction on 22nd February 2018. The stumps appearing in the photographs demonstrate that the trees were cut a long time ago. Some of the stumps were already overgrown with weeds whereas others were already decomposing. The court has also observed the photographs of the beans then growing on the suit property. When the school received the Plaintiff's letters of complaint (exhibit AN2) on 5th March 2018, the principal made an endorsement thereon indicating that the suit property already had KCSE agriculture plots planted with beans. He requested for more time until July 2018 to enable the students complete their project.
12. The court is satisfied on the basis of the material on record that the said beans were not planted after service of the order dated 22nd February 2018. The beans were already quite big at the time of filing the application for contempt.
13. Although the court must always be firm in ensuring that its orders are obeyed and that proved contemnors are punished, the court should not allow any litigant to abuse the court process. A court of law should not allow a party to obtain an eviction order disguised as a restraining injunction. The court is of the opinion that it was misled by the Plaintiff into granting a restraining injunction whereas the school appears to have been in possession. The court shall not countenance such an abuse of the court process. Accordingly, the court shall vary the order made on 22nd February 2018 under **section 3A of the Civil Procedure Act (Cap 21)** to allow the school to continue in possession until the suit is heard and concluded. The rest of the orders restraining the Defendant from alienating the suit property shall remain in force.
14. The upshot of the foregoing is that the court finds no merit in the Plaintiff's notice of motion amended on 6th June 2018 and the same is consequently dismissed with costs to the alleged contemnors. The court further makes an order of variation of the interim injunction made on 22nd February 2018 by removing reference to **“taking possession”** and **“interfering”** with the suit property in the said order. The school shall continue to utilize the land in its occupation fenced until the suit is heard and concluded.
15. It is so decided.

RULING DATED, SIGNED and DELIVERED in open court at **EMBU** this **14th** day of **FEBRUARY, 2019**.

In the presence of Mr. Siro for the Attorney General for the alleged Contemnors/Respondents and in the absence of the Plaintiff and the Defendant.

Court clerk Muinde.

Y.M. ANGIMA

JUDGE

14.02.19