



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISUMU

ELC CASE NO. 209 OF 2016 (O.S)

ZAKARIA MARI OSUNDWA.....PLAINTIFF

VERSUS

MORRIS SHYALIA ADHIAMBO.....1ST DEFENDANT

BONFACE WESONGA WANEKEYA.....2ND DEFENDANT

RULING

1. Zakaria Mari Osundwa, the Plaintiff, filed the notice of motion dated 23rd June 2017, seeking for an order committing Bonface Wesonga Wanekeya, the 2nd Defendant, to prison and costs. The application is based on the three (3) grounds on its face and supported by the affidavit of the Plaintiff sworn on the 23rd June 2017. The Plaintiff's case is that on the 29th March 2017, the court issued an order restraining the defendant from destroying the Plaintiff's crops and blocking the access road to the suit property. That the Order was extracted and served on 12th April 2017 with a penal notice. That the Defendant has declined to comply with the order and has continued with wanton destruction of the crops and blocking of the access road.

2. The application is opposed by Bonface Wesonga Wanekeya, the 2nd Defendant through his replying affidavit sworn on the 15th September 2017. The Defendant's case is that he has complied with the court order. That he stays on the suit property and that the Plaintiff has access to his house through a path passing through his land. That he is the administrator of the estate of his grandfather. That the estate comprises of more than 60 people and the Plaintiff has not specified who may have issued threats to him or violated the court order.

3. The application came up for hearing on the 19th February 2018 when Counsel for the Plaintiff and Defendant filed the written submissions dated the 20th April 2018 and 12th July 2018 respectively.

4. The following are the issues for the Court's determination;

a. Whether the Plaintiff has proved that the 2nd Defendant has disobeyed the court order, and if so what penalty to issue.

b. Who pays the costs.

5. The Court has carefully considered the grounds on the motion, affidavit evidence, Counsel's written submissions and concluded as follows;

a. That the Plaintiff commenced these proceedings through the Originating Summons dated the 8th August 2016 seeking to be registered with a half portion of Uholo/Tingare/319 that has been under his possession and use for over 12 years. That filed after the Originating Summons is the notice of motion dated the 16th September 2016 seeking for injunctive orders and costs.

b. The motion dated the 16th September 2016 was certified urgent on the 19th September 2016, and set for interpartes hearing on the 27th September 2016, when Counsel for the defendants applied for adjournment and leave to file replying affidavit of the 2nd Defendant. The court granted the two requests and simultaneously granted prayer 2 of the motion in the interim. The application was then heard interpartes and the interim order confirmed by granting prayer 3, limited to the portion of land parcel Uholo/Tingare/319 under the possession and occupation of the Plaintiff at the time the suit was filed.

c. That at the time the ruling on the motion dated the 16th September 2016 was delivered on the 29th March 2017, both Counsel for the Plaintiff and Defendants were represented by Counsel holding their brief.

d. That the 2nd Defendant has not disputed that he is aware of the court order. He has insisted that he has wholly obeyed the order contrary to the Plaintiff's claim that he has continued to destroy crops and obstruct his access to the land. That with these opposing positions taken by the Plaintiff and the 2nd defendant, the best and fast way to confirm who between the two is telling the court the truth is by the court visiting the locus/suit land either itself or through the Deputy Registrar.

6. That in view of the foregoing, the court directs as follows;

a. That the final ruling or order on the motion dated the 23rd June 2017 will await the court visit to the locus/suit land on a date to be fixed today.

b. That the visit to the locus/suit land will be made by the Deputy Registrar of this court, who shall thereafter file a report on the extent of the damages caused to the Plaintiff's crops, if any, and the manner the Plaintiff has been blocked from access the portion of land under his possession.

Orders accordingly.

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE

DATED AND DELIVERED THIS 27TH DAY OF MARCH 2019

In the presence of:

Plaintiff Absent

Defendants Absent

Counsel Mr. Odeny for the Plaintiff

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE