



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT OF KENYA AT MIGORI

ELC CASE NO. 851 OF 2017(O.S.)

ANDRONICA ONDORO NGIELA

MARY ACHIENG NGIELA

(Suing as Legal Administrators of

JOSEPH NGIELA MBORI- DECEASED).....PLAINTIFFS/APPLICANTS

VERSUS

SOPHIA MADEWA AMAYI

(sued as the legal administratrix of

ALEXANDER MIRERI-DECEASED).....DEFENDANT/RESPONDENT

RULING

1. By a Notice of Motion application dated 1st February, 2018 and filed on 5th February 2018 under Certificate of Urgency, the Plaintiffs/Applicants (hereinafter referred to as the “**Applicants**”) are seeking the following orders:

1. Spent.

2. That the Honourable court be pleased to cite and punish the Defendant (Respondent) for disobeying and /or disregarding the lawful court orders issued and/or granted on the 21/11/2017.

3. Consequent to prayer (2) herein above being granted, the honourable court be pleased to issue warrants of arrest, to bring the Respondent before this honourable court for committal to jail for disobedience.

4. Consequent to prayer (3), the Honourable court be pleased to commit the Respondent to jail for a duration not exceeding 6 months and/or such shorter period as the court may deem fit and expedient.

5. In the alternative, the honourable court to be pleased to grant an order of Sequestration to attach the properties of the Respondent, which properties be sold to defray the damages occasioned by the breach and/or disobedience of the lawful orders made on 21/11/2017.

6. Costs of this Application be borne by the defendant/respondent.

7. Such further Orders that may be made as the court may deem fit and expedient.

2. The application is premised on grounds (a) and (v) on it’s face. The grounds include that the respondent disobeyed this court’s orders issued on 21st November 2017. The 2nd applicant’s affidavit sworn on 15th February 2018 and documents marked **MAN 1 to MAN 3 (b)** also render support to the application. Document annexed and marked **MAN 1** is an order of the court for the maintenance of the status quo. Document marked **MAN 2** is an affidavit of service by a process server who duly served the orders on the respondent. Document marked **MAN 3(a)** are photographic pictures showing the fenced suit property and document marked 3b are photographic pictures of complete buildings with school children playing on the compound.

3. In her replying affidavit sworn on 31st March,2018 the Respondent contends that she had only been served with the originating Summons which instituted this claim for adverse possession and an objection to confirmation of Grant filed in Oyugis Magistrates court. She disputed

being served with the order referred to in the application. She further argued that construction on suit property started way back in the year 2016 and only covers 1 ½ acres being her portion of the suit property. As such, the status quo order is not related to it.

4. She further contends that she was not aware of court orders that she is now being accused of disobeying. She further claims that the instant application has been instigated by bad faith as well as malice and sought dismissal of the application with costs.

5. Directions were taken by this court on 24th May, 2018 that the parties argue the application by way of written submissions. The parties filed their respective submissions accordingly. In their submissions, counsel for the applicants Oguttu Ochwangi, Ochwal and Company Advocates made reference to the decision in **Miruka –vs- Abok & Another Civil Case No. 191 of 1985 [1990] KLR, 541-548 Gatimu Farmers Company –vs- Geoffrey Kagiri Kimani & 3 others [2005] eKLR, Mutitika –vs- Baharini Farm Ltd [1985] KLR 227-235 and Hadkinson -vs- Hadkinson [1952] LLA ER 567-575** to buttress their submissions.

6. DOE Anyula and Company Advocates for the respondent, identified seven (7) undisputed issues in their submissions dated 24th November 2018. Counsel submitted that the school existed before orders were issued by the court. That the suit land 0.5 hectares in area is intact as ordered by this court.

7. Briefly, at the core of the dispute is ownership of 0.5 hectares of **L.R. No. CENTRAL/KASIPUL/KAMUMA/13** (hereinafter referred to as the “**suit property**”). The applicant sought and was granted status quo order preserving the property. That the order so issued was disobeyed by the Respondent pending the hearing of the instant application.

8. The applicants contend that they have been living on the suit property peacefully for a period of 49 years and as such commenced proceedings seeking to acquire it by way of adverse possession. They contend that before the matter was fixed down for hearing, they filed an application dated 25th September 2017 seeking temporary orders to inhibit the Defendant/Respondent from dealing with the property and to have status quo maintained pending the outcome of the application. The orders were issued, extracted, sealed and duly served upon the Respondent who in spite of the orders, commenced and carried on construction on the suit property to purposefully defeat the applicants’ ownership rights in the suit property.

9. It is my very considered view that the issues that emerge for determination from the application, the affidavit in support of it, the affidavit in reply to the application and the parties respective submissions, are:-

a) **Did the court issue status quo orders on 21st November 2017, preserving the suit property?**

b) **Was the Respondent made aware of the status quo orders ?**

c) **Did the respondent deal with the property in contempt of the said orders?**

d) **What orders should this court make in view of the outcome of (b) above?**

10. Before I delve into the said issues, I find it imperative to note the procedure on proceedings of contempt of court. In **Christine Wangari Chege –vs- Elizabeth Wanjiru Evans & Others Civil Applicaton No. 233 of 2007 (2014) eKLR**, the Court of Appeal held that leave, is not required where committal proceedings relate to breach of a judgement, order or undertaking. Therefore I do find that the instant application is properly filed before this court.

11. I further note that the application is premised on the provisions of sections 4 and 5 of The Contempt of Court Act (hereinafter referred to as “**the Act**” which was declared invalid by my brother Mwita J. in the case of the **Kenya Human Rights Commission -Vs- Attorney General & Another [2018] eKLR**, due to lack of public participation. By the said decision, Section 38 of the Act which deleted **section 5 of the Judicature Act (Cap 8)**, is no longer in operation as the latter section is applicable.

12. **Section 5 of the Judicature Act** provides that:-

(1) The High Court and the Court of Appeal shall have the same power to punish for contempt of court as is for the time being possessed by the High Court of Justice in England, and that power shall extend to upholding the authority and dignity of subordinate courts.

(2) An order of the High Court made by way of punishment for contempt of court shall be appealable as if it were a conviction and sentence made in the exercise of the ordinary original criminal jurisdiction of the High Court.

13. According to **Black's Law Dictionary 10th Edition**,

" Contempt (also termed as contempt of court, judicial contempt) is a disregard of, disobedience to, the rules, or orders of a legislative or judicial body, or an interruption of its proceedings by disorderly behaviour or insolent language, in its presence or so near thereto as to disturb the proceedings or to impair the respect due to such a body."

14. In **Halsbury's Laws of England** it is stated:-

"It was the plain and unqualified obligation of every person against or in respect of whom an order was made by a court of competent jurisdiction to obey it unless and until it was discharged and disobedience of such an order would as a general rule result in the person disobeying it being in contempt and punishable by committal or attachment

application to court by him not being entertained until he had purged his contempt"

15. Setting out the basis for the need to respect court Orders, Justice S.N. Riechi in the case of **Patrick Wanyonyi Munialo -v - County Executive Committee (CEC) Member for Water & Natural Resources Bungoma County & 3 others; Nzoia Water Services Co. Ltd (Interested Party); Kennedy Kilali Wekesa & 2 others (Contemnor) [2019] eKLR** stated:

“The rationale for contempt of court proceedings is grounded on the need to protect the authority and dignity of our courts which is essential for the maintenance of rule of law and order in society. Its objective is to uphold the dignity and authority of the court, ensure compliance with orders of the court; ensure observation and respect the due process of law and multiply public confidence in the administration of Justice.”

16. In **Petition No. 3 of 2014 in Hon. Martin Nyaga Wambora & 4 Others vs. Speaker of the Senate & others (2014 eKLR)** it was rightly observed that:

“...we must state this point that the disobedience of a Court order is a grave issue as it undermines the rule of law. Article 10 of the Constitution identified the rule of law as one of the guiding principles of governance. Article 3 of the Constitution is very clear that every person has an obligation to respect and defend the constitution. So that any person who disobeys a court order violates the Constitution.”

17. On the importance of obeying court orders, it was held in the case of **Shimmers Plaza Limited Vs. National Bank of Kenya Limited [2015] eKLR** thus:-

“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 pushed, lest they lead us to a state of anarchy. We think we have said enough to send this important message across.”

18. Considering exhibit “MAN 4” in notice of motion dated 13th October 2017, as seen in Exhibit “MAN-3a” and Exhibit “MAN-b,” there was a fence on the suit property. The pictures (MAN 3a) and MAN 4 show that the suit property was partially undeveloped. However, the respondent averred in her replying affidavit that the school project started in year 2016. That the school only covers an area measuring approximately 1 ½ acres and that it is not part of the suit property of 0.5 hectares.

19. The Respondent claims that the construction was done on her own portion of land. She averred that the suit property measuring 0.5 hectares is intact. That there are two separate and distinct pieces of land in issue. She also stated that she has not sold it contrary to the claim by the applicants with regard to the land, LR.NO. CENTRAL/KAMUMA/13.

20. There is no doubt that the status quo order was issued, extracted and sealed by the Court on 21/12/2017. The order reads:-

a) “Hearing of the Notice of Motion Application dated 13th October 2017, be heard on the 5th day of February 2018. The defendant to be served.

b) Status Quo to be maintained on the suit property, that is, LR NO. CENTRAL/KASIPUL/KAMUMA/13 before the next inter-partes hearing on the 5th day of February 2018 to preserve the property.”

21. Quite clearly, the order granted on 21/11/2017, was served upon the Respondent as shown on the affidavit of Service marked MAN-1. The order has a penal notice mounted on it. The respondent has demonstrated and maintains that the suit property measuring 0.5 hectares as shown even in the pleadings, is still intact. To that end, the respondent can not be termed to be in contempt of the status quo order issued on 21st December 2017.

22. I am aware of the fact that there is a higher burden of proof on an applicant in contempt proceedings to prove that a contemnor’s conduct was deliberate and wilfully done in breach of court orders. That is so because the nature of the reliefs sought impact on a persons’ liberty. However, in the instant application, I am of the considered view that the essential ingredients of contempt of court were never established and proved to the required standard.

23. The upshot is that the notice of motion dated 1st February 2018 mounted by the applicants against the respondent fails thus I disallow it with costs in the cause.

DELIVERED, SIGNED AND DATED IN OPEN COURT AT MIGORI THIS 13TH DAY OF MARCH 2019.

G. M. A. ONG’ONDO

JUDGE

In the presence of

Ms. W. Ochwal learned Counsel for the Plaintiffs/ Applicants.

Respondent and Counsel for the Respondent- Absent

Tom Maurice – Court Assistant