



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT ELDORET

ELC CASE NO. 314 OF 2017

GLADYS VULDI.....1ST PLAINTIFF

HERBERT IGADWA.....2ND PLAINTIFF

VERSUS

DANIEL KIPKETER RUGUT.....DEFENDANT

RULING

This ruling is in respect of an application dated 21st May 2018 by way of notice of motion by the plaintiff/applicants for orders:

- a) Spent
- b) Spent
- c) THAT the Respondent, Daniel Kipketer Rugut be committed to civil jail for a term of six (6) months for contempt of court for blatantly disobeying and/or defying court orders issued on 14th November, 2017 and also be fined the sum of Kshs. 5,000,000/=
- d) THAT the Respondent, Daniel Kipketer Rugut be directed to restore the Applicants' property/houses/fence and/or any other structures interfered with in the state they were in before interference and/or destruction.
- e) THAT this court be pleased to order/direct the OCPD Koitabut, the OCS Koitabut and the Officer in charge, Koitabut Police Station to ensure that the Applicants occupation is not interfered with and to ensure full compliance of the court Order.
- f) THAT costs of this application be in the cause.

Counsel agreed to canvass the application vide written submissions which were duly filed. The court had ordered the respondent to appear in court during the hearing of this application and the same was complied with on 12th June 2018.

Plaintiff/Applicant's Submission

Counsel for the plaintiff submitted that the basis of the present application is that this court made a determination on an application dated 18th September, 2017 brought by the Applicants seeking to restrain the Respondent, his agents, servants and/or assigns or any other person claiming or acting on the Respondent's instructions from interfering, disturbing, destructing and/or in any other manner interfering with the Applicants' occupation on the suit land on 30th October, 2017.

Counsel submitted that the Court order was to the effect that " pending the hearing and determination of the suit a temporary injunction was issued against the Respondent, his agents, servants and/or any other person claiming or acting on the Respondent's instructions restraining them from disturbing the Applicants' occupation of the land, physically taking away/removing the Applicants' property barring access to the suit property, evicting and/or in any other manner interfering with the Applicants' occupation of land parcel No. KEMOLOL/KABARAK'A/175" which order was served on the respondent who instructed counsel upon receipt of the order.

Miss Odwa submitted that despite service of the Court order and the Respondent being aware of the Court Order, the Respondent proceeded to erect structures on the suit land, disturbing the Applicants' occupation of the land and barring the Applicants access to the suit property which action constitutes acts of contempt.

Counsel therefore urged the court to determine the following issues:

- 1) Whether the Respondent had knowledge of the orders of the Court made on 30/10/2017.
- 2) Whether the Respondent breached the terms of the orders made on 30/10/2018.
- 3) Whether the Respondent had knowledge of the orders of the Court made on 30/10/2017

Counsel submitted that it is not disputed that the Respondent was served with the pleadings in this matter and the court order and therefore had knowledge of the order. Further that it is not disputed that the Respondent has all along been represented by a Counsel throughout the proceedings and the court record can bear witness.

Miss Odwa Counsel for the plaintiff also submitted that the order was properly served on the respondent as per the provisions of Order 5 Rule 14 of the Civil Procedure Rules 2010. Further that in addition and out of abundant of caution the Area chief was notified to alert the Respondent of the Court order who brought to the attention of the Respondent the existence of the court order but the Respondent simply chose to disregard the orders even during the pendency of the contempt proceedings which acts are evidenced in annexure GV I of the affidavit in support of the application.

Counsel relied on the case of **Kenya Tea growers Association versus Francis Atwoli and 5 Others Petition No. 64 of 2010** where the Court held as follows:

“ in the case before me, I am more than satisfied that even at higher level of beyond reasonable doubt , when an individual has been served with and/or has knowledge of the court order but not only ignores it but in fact incites others to do the same , the threshold for contempt has been met. Francis Atwoli in fact went further to arrogate himself the decision to determine when the strike would end despite the fact that the court order had stopped it... his contempt was obvious and his conduct and words can attract no other finding”.

Counsel submitted that the applicant had met the threshold for granting the orders sought in this application.

On the second issue as to whether the Respondent breached the terms of the orders made on 30/10/2018, Counsel cited the case of **Spoke versus Banbury Board of Health Wood V.C** stated as follows:

“The simple and only view is that an order must be obeyed”. That those who wish to get rid of that order must do so by the proper course, an appeal. So long as it exists the order must be obeyed, and obeyed to the letter”.

Counsel submitted that the Respondent knew of the injunctive order made on 30/10/2017 but still opted to hire goons to descend on the subject property and destroy the applicant's property and put up his own structures with the aim of evicting the Applicants contrary to the orders of this court so as to render the originating Summons seeking adverse possession useless. It was Counsel's submission that the respondent has on three occasions been in court and the issue of the injunctive orders has always been very clear but he blatantly disobeyed the court order.

It was Counsel's further submission that the only way for the court to ensure that its dignity is preserved and the rule of law upheld is to have the Respondent punished harshly for belittling and/or demeaning this court. Further that the respondent has not denied that acts of contempt have actually taken place. Counsel therefore urged the court to allow the application as prayed.

RESPONDENT'S SUBMISSIONS

The respondent opposed the application vide his replying affidavit on grounds that he was neither served nor had knowledge of the existence of the order. Counsel for the respondent submitted that the respondent was not personally served with the order and that he does not reside on the suit land as alleged by the plaintiff.

Counsel submitted that the affidavits of service and the submissions by the Applicant shows that the Respondent was served vide postal office while in their submissions they reiterate that the court orders were pinned on the gate. Further that there is nothing on record to show that attempts were made to effect service to the Respondent.

Counsel submitted on the requirement for personal service which must be complied with as per the Court of Appeal ruling in the case of **Nyamodi Ochieng-Nyamodo & another VS Kenya Posts and Telecommunications Corporation Civil Application No. NAI 264 OF 1993(NAI1114/93 UR)**

Counsel also relied on Halsbury's Laws of England 94th Ed) Vol. 9 on page 37 para 61 that;

"Necessity of personal service; as a general rule, an order of court requiring a person to do or abstain from doing any act may be enforced unless a copy of the order has been served personally on the person required to do or abstain from doing the act in question "

Counsel therefore submitted that in the absence of personal service, it would not be possible to punish the Respondent for contempt.

Secondly Counsel submitted that for one to be found guilty of contempt there must be willful and deliberate disobedience of the court order. One must have been served or must have had actual or constructive knowledge of the court order of which he stated that the respondent was not aware of the order. Counsel cited the case of **Shimmers Plaza Limited** where the Court posed the question, whether knowledge of a court order or judgment by an advocate of the alleged contemnor would be sufficient for purpose of contempt proceedings and it answered the question in the affirmatives stating:-

"We hold the view that it does. This is more so in a case as this one where the advocate was in court representing the alleged contemnor and the orders were made in his presence. There is an assumption which is not unfounded, and which in our view is irrefutable to the effect that when an advocate appears in court on instructions of a party, then it behooves him to report back to the client all that transpired in court that has a bearing on the clients' case... "

Counsel therefore submitted that the respondent was not aware of the orders granted by the court and that after service of the current application the respondent has always presented himself to court personally as directed by the Honorable Court as such he is a law abiding citizen.

Counsel also submitted that the elements of contempt have not been proved. He cited the case of *Gatharia K.Mutikika v Baharini Farm limited* [19851 K-LR, where the court stated as follows;

"A contempt of court is an offence of a criminal character. A man may be sent to prison. It must be proved satisfactorily... it must be higher than proof on a balance of probability, almost but not exactly beyond reasonable doubt.. ...the guilty has to be proved with such strictness of proof as is consistent with the gravity of the charge ..."

It was Counsel's submission that the application before the court is made in bad faith for it does not meet the litmus test of granting such orders and only intended to adjourn the hearing of the main suit. Counsel therefore urged the court to dismiss the application with costs and set down the suit for hearing.

Analysis and determination

This is an application for committal of the respondent to civil jail for disobeying court orders. The application sets out the background leading to the current application. The court granted an order of injunction on 30th October 2017 which was served on the respondent.

The issues for determination in an application of contempt of court are as to whether the orders were served on the contemnor, whether he had knowledge of the existence of the order and if so whether he/she wilfully disobeyed the court order.

From the replying affidavit on record, the respondent admits in paragraphs 5, 6,7,8 and 9 that he was served with the pleadings and handed over the documents to his Advocate on record who was to represent him fully. The respondent further blames his Counsel on record at paragraph 12 as an inordinate mistake on the part of his advocate on record.

I notice that the replying affidavit is contradictory of the facts as put by the respondent. In one breath he is stating that he was not served but in another he blames his advocate for not representing him in the case and later also absolving him of the mistakes. Which version is the court supposed to take as the correct position?

I find that the respondent was served with the order and had knowledge of the order as admitted in his affidavit. Court orders must be obeyed whether a party agrees with its contents or not and as long as the order still subsists, then it remains a valid court order that must be adhered to. The adherence to the court order is not optional and if a party does not agree with the contents then he/she can apply for review, variation or appeal. The applicant can also make an application informing the court of the difficulty in the adherence of the order through a review.

In the case of **Kenya Tea Growers Association Vs Francis Atwoli and 5 Others [2012] eKLR Lenaola J** (as he then was) cited with approval the case of **Clarke and Others Vs Chadburn & Others [1985] 1All E.R (PC), 211** in which the court observed that:

"I need not cite authority for the proposition that it is of high importance that orders of the courts should be obeyed, willful disobedience to an order of the court is punishable as a contempt of court, and I feel no doubt that such disobedience may properly be described as being illegal....even if the Defendants thought that the injunction was improperly obtained or too wide in its terms, that provides no excuse for disobeying it. The remedy is to vary or discharge it."

I also subscribe to the fact that court orders must be obeyed to avoid anarchy. There must be respect of the rule of law. I have considered the application, the responses and submission by Counsel and find that the respondent is in contempt of court order dated 30th October 2017 which he wilfully disobeyed. The respondent's Counsel started a line of mitigation by submitting that the respondent is a law abiding citizen who has been attending court as had been ordered by the court. This is for the next level in this application.

Having said that, I find that the respondent is in contempt and shall appear before this court on an agreed date for sentencing/ and or sanctions against him.

DATED and delivered at Eldoret this 1st day of April, 2019

M.A. ODENY

JUDGE

RULING READ IN OPEN COURT

in the presence of:

Mr. Momanyi holding brief for Miss Odwa for plaintiff/Applicant and in the absence of Mr.Sagasi for the Defendant.

Mr. Koech - Court Assistant