



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC APPEAL NO. 7 OF 2016

BENSON MURIUKI KIBATA.....APPELLANT

VERSUS

GIKIRI FRANCIS GIKIRI.....1ST RESPONDENT/APPLICANT

GIKIRI M. NJOROGE.....2ND RESPONDENT/APPLICANT

AND

JOSEPH M. GICHOYA.....INTERESTED PARTY

RULING

The application before me is the Notice of Motion dated 2nd October 2017 brought under *Order 1 Rule 15 Section 1A (B) CPA, Article 10 (2) of 159 of the Constitution of Kenya, Section 4 of 5 of the Contempt of Court Act No. 49 of 2016*. The Applicant is seeking the following orders:

1. Spent.

2. That this Court be pleased to cite and find the following persons in contempt of its orders made on the 16th day of June 2017 and forming Court record, and the said persons be committed to civil jail for a term of six (6) months and/or be ordered to move the contempt of the Court in terms that this Court deems mete and just.

(a) GITARI NJOROGE – 2ND RESPONDENT

(b) JOSEPH M. GICHOYA – 3RD PARTY

3. That the loss and damage occasioned by the 2nd Respondent and the 3rd party's action to the suit property be assessed by the Honourable Court and damages be awarded to the Appellant/Applicant.

4. That the National Police Service and in particular the Officer Commanding Station Gichugu ensure compliance with the orders of this Court issued on 16th day of June 2017 by this Honourable Court.

5. This Honourable Court be pleased to issue any further orders as it deems fit and just.

6. That costs of this application be provided for.

That application is opposed with grounds of opposition filed by the firm of Magee Wa Magee & Co. Advocates for the Respondents.

THE 3RD PARTY'S CASE

The 3rd party named as Joseph M. Gichoya filed a replying affidavit in opposition to the application sworn on 6th October 2017. In his response, the 3rd party deponed that he is a stranger in the proceedings in the lower Court and in this appeal and that there is no order that has ever been issued enjoining him as a party. He further deponed that as far as he is concerned, he is only aware of land parcel No. BARAGWI/THUMAITA/2813 which initially belonged to the 2nd respondent. Sometime in 2005, he purchased the land and was put in occupation immediately and that he has extensively developed the same by planting coffee stems. He admits that he has seen a copy of the

order which was issued on 16th June 2017 and that despite the appellant knowing that he has been on the land since 2005, he was not made a party. He stated that no eviction orders have been issued against him from the suit property. He deponed that the orders of 16th June 2017 have never been served upon him and that he saw them for the first time when he was served with this application on 3rd October 2017.

2ND RESPONDENT'S CASE

The 2nd respondent also filed a replying affidavit opposing this application sworn on 4th March 2019. According to him, this application is incompetent, bad in law and an abuse of the Court process for the following reasons:

- (a) The contempt of Court Act was duly declared un-constitutional by the High Court.**
- (b) That the applicant seeks to cite one GITARI NJOROGE for contempt. The said name does not refer to him.**
- (c) That prayer 3 in the Notice of Motion is a new cause of action that can only be canvassed substantively in a separate suit.**
- (d) That prayer 4 in the Notice of Motion is incapable of being granted since the National Police Service cannot be compelled to enforce a negative order.**

He admitted that on 16th June 2017, the Honourable Court issued an injunction restraining him from trespassing or interfering with the applicants quiet possession and use of L.R. No. BARAGWE/THUMAITA/2813. However, he stated that at the time of issuance of that order, he was not in possession of the land and has not been on the land and that he has not violated the orders of the Court. He stated that he sold the suit land to the 3rd party in 2005 who took exclusive possession of the same and that he has not been made a party in the proceedings although the applicant knew all along that he was the one who had possession of the same and was developing the same.

ANALYSIS AND DECISION

This Court has stated over and over that Court orders must be obeyed. Parties against whom such orders are made cannot be allowed to disobey them with impunity. **Section 63 (C) CPA** lays foundation for contempt proceedings and provides as follows:

“In order to prevent the ends of justice from being defeated, the Court may, if it so prescribed grant a temporary injunction and in case of disobedience commit the person guilty thereof to prison and order that his property be attached and sold”.

In **SHIMMERS PLAZA LIMITED VS NATIONAL BANK OF KENYA LIMITED (2015) e K.L.R.**, the Court of Appeal held:

“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”.

Again in **KITSURI LIMITED VS KUPARCHAND DEPAR SHAL (2006) e K.L.R.**, the Court held:

“In Peter K. Yego & another Vs Pauline Nekesa Kode, the Court recognizing that contempt of Court is criminal, held that it must be proved that one has actually disobeyed the Court order before one is cited for contempt. The applicant in an application for contempt must prove beyond peradventure that the respondent is guilty of contempt

Although the proceedings are civil in nature, it is well established that an applicant must prove the elements beyond reasonable doubt, at least higher than the standard in civil cases, the fact that the liberty of the defendant could be affected means that the standard of prove is higher than the standard in civil cases. It is incumbent on the applicant to prove that the defendant's conduct was deliberate in the sense that he or she deliberately or willfully acted in a manner that breached the order”

I have considered with anxious care the Notice of Motion dated 2nd October 2017, the supporting affidavit and the response by the respondent and the 3rd party. I have also looked at the order of this Court issued on 16th June 2017. I have also perused the pleadings in this suit and the applicable law. In the judgment of this Court issued on the said 16th June 2017, the Court issued a permanent injunction against the respondents restraining them from working, trespassing or interfering with the appellant's quiet possession and use of land parcel number BARAGWE/THUMAITA/2813. The defendant in that case are GITARI FRANCIS GIKIRI and GIKIRI NJOROGE. The orders also by implication bind not only the respondents but also their personal representatives, servants and/or agents. The third party in this case is an agent of the respondents as pleaded in a Notice of Motion brought by the respondents in this appeal dated 7th August 2017. In a supporting affidavit sworn by GIKIRI NJOROGE at paragraph 4 & 5, the said respondent stated as follows:

“(4) That from the record, it is not in dispute the respondent/Appellant has never taken possession of L.R. No. BARAGWE/THUMAITA/2813 since it was transferred to his names in 2005.

(5) That the said land has been in possession of one JOSEPH M. GICHOYA who purchased the land from us”.

From those averments, it is clear that the 3rd party is an agent who was put into the suit property by the respondents. The permanent injunction orders issued against the respondents therefore binds their agents and/or servants including the 3rd party herein. The affidavit in support of this said application sworn by GIKIRI NJOROGI is an admission that the 3rd party herein is committing acts of trespass in the suit property against the order of this Court issued on 16th June 2017. The said deponent of the said affidavit GIKIRI NJOROGI who is the 2nd respondent admitted that they are the ones who put JOSEPH M. GICHOYA (3rd party) in the suit property. That in my view is a clear breach of the orders of this Court. I also find that the supporting affidavit of the applicant has given instances where the 2nd respondent and the 3rd party committed acts of trespass which have not been controverted. I am satisfied that the applicant has proved his case against the 2nd respondent and the 3rd party on the required standard. In the result, I cite the two for contempt of the orders of this Court issued on 16th June 2017.

In order to protect the dignity and integrity of this Honourable Court, I order each of the two to pay a fine of Ksh. 100,000/= failing which they shall be jailed for six (6) months each. The respondents shall also pay the costs of this case. It is so ordered.

READ, DELIVERED and SIGNED in the open Court this 14th day of June, 2019.

E.C. CHERONO

ELC JUDGE

14TH JUNE, 2019

In the presence of

1. M/S Githaiga holding brief for Mr. Magee for Respondents
2. Ms Nyangati holding brief for Maina Kagio for 3rd Party
3. Appellant/Applicant in person – present
4. Court clerk - Mbogo