



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 1 OF 2017

BERNARD MURIMI JOHN MUTUGI.....1ST PLAINTIFF

FLORENCE NYAMBURA MURIMI.....2ND PLAINTIFF

VERSUS

FRANCIS MURAGE CUNGU.....1ST DEFENDANT

DAVID MURIITHI MURAGE.....2ND DEFENDANT

MICHAEL MWANGI MURAGE.....3RD DEFENDANT

EVANS IRUNGU MURAGE.....4TH DEFENDANT

RULING

BACKGROUND

The Applicant, Bernard Murimi John Mutugi filed the Notice of Motion dated 21st May 2019 under **Section 63 (e) CPA, Order 41 Rules 1, 3 and 4 CPR**. He seeks an order to commit the Respondents herein to prison for disobeying the orders of this Honourable Court issued on 15th May 2017. In his affidavit in support of that application, the Applicant contends that the 1st Respondent Francis Murage Cungu is the registered proprietor of land parcel No. MWERUA/KAGIO/4476 which borders L.R. No. MWERUA/KAGIO/4477. He averred that on 10th January 2018, this Honourable Court issued a temporary injunction restraining the Respondents, their agents, servants and/or representatives from entering, encroaching or remaining on land parcel No. MWERUA/KAGIO/4477. The Applicant further stated that in blatant disobedience of that order, the Respondents encroached his land on 14th May 2019 without his consent and tilled it while he was away for Christmas. When he came back, he discovered the said violation.

In response to that application, the Respondents filed grounds of opposition opposing the application. The Respondents argument from the said grounds of opposition is that the main issue in controversy in this suit relates to boundary dispute which is yet to be determined and unless the issue is determined, it can be said that anyone has encroached on the land of another person.

I have considered the application dated 21st May 2019 and the arguments for and against the same. From a consent order entered between the Applicant and the Respondent on 15th May 2017, an injunction was issued restraining the Respondents, their agents, servants and/or representatives from entering, encroaching or remaining on the land parcel No. MWERUA/KAGIO/4417 pending the hearing of the suit. The present application is premised on that order which the Applicant contends was violated by the Respondent who encroached on the same by tilling without his consent on 14th May 2019. He stated that he discovered the said violation of the Court orders when he came back from Christmas holidays on 2nd December 2017. The Plaintiff/Applicant in his plaint dated 4th January 2017 is seeking judgment for inter alia a declaration that the defendants have unlawfully trespassed and encroached on land parcel No. MWERUA/KAGIO/4477. The Plaintiff/Applicant is also seeking an order for eviction of the defendant. The Plaintiff/Applicant and the defendant/Respondent are neighbours occupying parcel numbers MWERUA/KAGIO/4477 and 4476 respectively. The nature of dispute between the two combatants can only be resolved by a surveyor who is an Expert witness. The consent order which was entered between the Plaintiff/Applicant and the Defendant/Respondent on 15th May 2017 did not in any way determine the dispute between the parties. That consent order in my view was of no legal effect unless the surveyor carries a proper survey to determine the actual boundaries between the two parties.

I also hasten to add that before a party is punished for disobeying a Court order, the Court must be satisfied that the contemnor was served with the order complained of with a penal notice indicating the consequence of disobedience. In this case, there is no indication that the Respondents were served with the order and a penal notice. It is important that service of the order and notice be effected since a contempt application has the effect of depriving a party his fundamental freedom of movement which is a Constitutional right.

In the final analysis, I find the application dated 21st May 2019 lacking merit and the same is dismissed with costs to be in the cause. It is so ordered.

READ and SIGNED in open Court at Kerugoya this 19th July, 2019.

E.C. CHERONO

ELC JUDGE

19TH JULY, 2019

In the presence of:

1. M/S Githaiga holding brief for Mr. Magee for Plaintiffs

2. Respondents/Advocate – absent

3. Mbogo, Court clerk – present