



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

CASE No. 277 OF 2017

CHRISTOPHER K KANDIE.....1ST PLAINTIFF

AMOS KANGOGO CHEBIL.....2ND PLAINTIFF

CHARLES YEGO TOROITICH.....3RD PLAINTIFF

WILLY KURGAT..... 4TH PLAINTIFF

VERSUS

ZEPHANIAH CHERUTICH CHEPTIRIM... 1ST DEFENDANT

BENARD KIBET CHERUTICH..... 2ND DEFENDANT

LORGIS LOGISTICS LIMITED.....3RD DEFENDANT

RULING

1. This court made the following order on 30th January 2018:

... I grant an injunction restraining the defendants, their servants, agents, employees and/or those claiming through them from alienating, transferring, and/or making any disposition in respect of the parcel of land known as Plot No. 293 being part of LR No. 6207/2 Nakuru pending the hearing and determination of this suit. ...

2. The plaintiffs now maintain that the order has been disobeyed. By Notice of Motion dated 4th July 2018, they seek an order that the 1st and 2nd defendants be held in contempt of this court's order of injunction made on 30th January 2018 and be accordingly punished by way of committal to civil jail for a period not exceeding six months or otherwise until the contempt is purged. The application is brought inter alia under **Sections 27 (b) and 28 (1) of the Contempt of Court Act 2016**. It is supported by an affidavit sworn by the 1st plaintiff. It is deposited in the supporting affidavit that the defendants have contravened the order by cultivating on the suit property. Some photographs are annexed.

3. The defendants oppose the application through a replying affidavit sworn by the 2nd defendant. He deposed that upon being informed of the court order, none of the defendants have dealt with in any manner that disobeys the order and that if there are any crops on the suit property then they were not planted by the defendants. Regarding the photographs, he stated that they do not pinpoint with certainty that they were taken at the suit property.

4. The application was canvassed by way of written submissions. The applicants contend that the order was made in the presence of counsel for the defendants and that the defendants were therefore aware of it. They therefore urge the court to grant the orders sought. For the respondents, it is submitted that the applicants have not discharged the higher burden of proof required in applications seeking to punish a party for contempt and that the photographs submitted do not comply with the provisions of **Sections 78, 78A and 106B of the Evidence Act** since they are not accompanied with a certificate. Further that even if there was proof that the suit property has been cultivated, the applicants must prove that the cultivation was by the respondents, which they have failed to do.

5. I have considered the application, the affidavits and the submissions. From the onset, it must be pointed out that although the application is brought under **Sections 27 (b) and 28 (1) of the Contempt of Court Act 2016**, the said statute was declared unconstitutional and invalid on 9th November 2018 in **Kenya Human Rights Commission v Attorney General & another [2018] eKLR**. It is thus not part of the laws of Kenya any more. Nevertheless, the court retains its inherent power to punish for contempt of court under **Article 159 of the Constitution, Section 3A of the Civil Procedure Act** and the substance of the common law as applied under **Section 3 of the Judicature Act**. In **Woburn Estate Limited v Margaret Bashforth [2016] eKLR**, the Court of Appeal stated:

The jurisdiction of the High Court (or any other court for that matter) to punish for the violation of its orders cannot be in question. Apart from section 5 (1) of the Judicature Act that vests in the High Court the power, like those of the High Court of Justice in England, to punish any party who violates its orders, the court, by virtue only of being a court has inherent powers to make sure its process is not abused and its authority and dignity is upheld at all times. See Refrigeration and Kitchen Utensils Ltd v Gulabchand Popatlal Shah & Another, Civil Application No.39 of 1990, where it was observed.

“A party who knows of an order, whether null or valid, regular or irregular, cannot be permitted to disobey it... It would be most dangerous to hold that the suitors, or their solicitors, could themselves judge whether an order was null or valid-whether it was regular or irregular. That they should come to the court and not take upon themselves to determine such a question.....he should apply to the court that it might be discharged. As long as it exists it must not be disobeyed.”

6. An application seeking punishment of a person for contempt of court is a serious matter liberty of the subject is at stake. There are many authorities that restate that burden of proof in such applications is higher than proof on a balance of probabilities but not as high as proof beyond reasonable doubt. See Kenya National Union of Teachers & 2 others v Teachers Service Commission [2018] eKLR.

7. The allegation against the defendants herein is that they cultivated on the suit property in total disobedience of the order made by this court on 30th January 2018. A reading of the order makes it abundantly clear that it restrained the defendants from **alienating, transferring, and/or making any disposition** in respect of the suit property. The order was made after an inter parte hearing of plaintiffs' Notice of Motion dated 3rd July 2017. The wording of the order was along the lines of the said application. It is thus apparent that the order does not stop cultivation. If indeed the defendants cultivated, that conduct is of itself not a disobedience of the order made by this court on 30th January 2018.

8. Even if the order barred cultivation, I would have considered that the only evidence offered to support the allegation of cultivation are the photographs. The photographs do not show that the cultivation was on the suit property or that it was by the defendants. Clearly, the applicants would either way not have surmounted the higher burden of proof.

9. In view of the foregoing, Notice of Motion dated 4th July 2018 has no merit. It is dismissed with costs to the defendants.

10. Ruling in this matter was to be delivered on 13th March 2019 but was delayed since I proceeded on a lengthy medical leave. The delay is regretted.

Dated, signed and delivered in open court at Nakuru this 18th day of July 2019.

D. O. OHUNGO

JUDGE

In the presence of:

No appearance for the plaintiffs/applicants

No appearance for the defendants/respondents

Court Assistants: Beatrice & Lotkomoi