



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO.124 OF 2014

JACKSON KARIUKI KAHUNGURA1ST PLAINTIFF

RUTH WAMBUI CHEGE.....2ND PLAINTIFF

VERSUS

HON. JOHN KARANJA KIHAGI1ST DEFENDANT

ROBINSON KUTO.....2ND DEFENDANT

RACHAEL WANJIKU MAINA3RD DEFENDANT

MUTISYA MUTUKU.....4TH DEFENDANT

ATTORNEY GENERAL.....5TH DEFENDANT

AND

KARAGITA LANDING BEACH SELF HELP GROUP....INTERESTED PARTIES

RULING

(Application for contempt; contempt displayed; application allowed)

1. The application before court is that dated 19 June 2019 filed by the plaintiffs. It seeks orders for the following persons namely, Robinson Kuto, David Oduor Kilo, Joseph Kamau Thuo and Samson Mwangi (respondents), to be held in contempt of court and to be committed to jail for a period of 6 months or such period that the court deems fit for disobeying the orders of court made on 25 April 2018. In the alternative, the applicant has sought orders of attachment of the properties of the respondents as a consequence of disobedience of the orders of 25 April 2018. There is a prayer within the application for the OCPD Naivasha to provide security during closure of a road in LR No. 396/39 but the said order was already allowed and is therefore no longer subject to a ruling of this court.

2.To put matters into context, the subject matter of this suit is the land parcel LR No. 396/39 which is owned by the applicants. The said land is located in Naivasha, off the Moi South Lake Road and abuts Lake Naivasha. The applicants acquired this land in the year 2011 and upon purchase embarked on various agricultural activities therein. In the month of May 2014, following a meeting held by the National Assembly Land Committee, there was a road side declaration that the suit land is a public access corridor to Lake Naivasha, and there followed a sequence of events which led to the invasion of the applicants' land by various persons under the misguided belief that part of the suit land was a public corridor. What ensued was a destruction of the property of the applicants and an intrusion by the public into their private property who now used the land to access the lake. It is this which led the applicants to file this suit seeking orders of a permanent injunction to restrain the defendants from the suit land, general damages for trespass, and special damages for the property destroyed. In the course of the proceedings, a group calling themselves, Karagita Landing Beach Self Help Group, through Mr. David Oduor Kilo, Joseph Kamau Thuo and Samson Mwangi, (the 2nd, 3rd and 4th respondents) applied to be enjoined as interested parties in the proceedings and they were so enjoined as they were users of the alleged public corridor.

3. I heard the suit, and delivered judgment on 25 April 2018. There was absolutely no doubt in my mind that the suit land was private land and there has never been any public access corridor on it and I held as much. I issued a permanent injunction restraining the defendants, interested parties, and indeed any person not authorized by the plaintiffs from interfering with the applicants' quiet possession and use of the suit land. I found the 2nd defendant, Mr. Robinson Kuto, the 1st respondent in this application, to have been guilty of storming the applicants'

property and thus liable to pay damages in the sum of Kshs.8,037,309.88/= and also entered judgment against him in the sum of Kshs. 500,000/= as general damages for trespass. It is this judgment which the applicants now contend that the respondents are in contempt of.

4. The supporting affidavit is sworn by the 1st applicant, Mr. Jackson Kariuki Kahungura. He has deposed inter alia that the decree was served upon counsel for the respondents and further that the 1st respondent (2nd defendant) is well aware of the judgment as he has filed a Notice of Appeal. He also believes that the terms of the judgment are well within the knowledge of the other respondents as they also filed a Notice of Appeal. He has averred that the respondents in blatant disregard of the judgment have continued to enter into and use the suit land as an access corridor to Lake Naivasha.

5. Each of the four respondents swore separate replying affidavits. In his replying affidavit, Mr. Kuto has deposed inter alia that he is aware of the judgment and that he has moved his boat from the beach in question and moved to Kihoto beach where he operates at the moment. He has averred that upon advice of their counsel, the Karagita Beach Self Help Group held a meeting and agreed to abide by the court judgment. He has denied breaching the terms of the judgment, nor being in contempt of court. He has denied trespassing into the plaintiff's land since delivery of the judgment.

6. Mr. David Kilo, in his replying affidavit has deposed that he has been the chairman of Karagita Landing Beach but that in the course of the proceedings the group held elections and new officials took office and the conduct of this suit. He has deposed that after the elections he moved out of Karagita and went to the North Lake where he works and contested the seat of Member of County Assembly (MCA). He has stated that he has no attachment with Karagita beach to warrant him being on the disputed road. He has denied breaching the terms of the judgment or being in contempt of court.

7. Mr. Samson Mwangi on his part has deposed in his replying affidavit that he was Secretary of Karagita Landing Beach but after the elections of the group, new officials took over. He has deposed that he has since moved to Kihoto beach and has not breached the terms of the judgment.

8. There is a purported affidavit of Joseph Kamau; I say purported, because that affidavit is not signed. Since it is not signed, I will not even discuss it for it is as good as if no affidavit has been sworn and filed by the said Joseph Kamau Thuo.

9. There is a supplementary affidavit sworn by the 1st applicant which reiterates that the respondents are aware of the judgment and that is why they filed notices of appeal. He has also referred to an affidavit that was filed by the 1st respondent, in the Court of Appeal, while seeking a stay pending appeal, where he stated inter alia that *"the said access road to the lake is the only access to our source of livelihood and the same should not be closed awaiting the hearing of the appeal"*, and he believes that the respondents have no intention of honouring the judgment of this court. For the record, I have seen that the said application for stay pending appeal was dismissed by the Court of Appeal.

10. I invited counsel to file submissions but I have only seen the submissions of counsel for the applicants. He believed that the respondents are aware of the judgment of this court and are guilty of contempt.

11. I have considered the application. There is already judgment on record for the plaintiffs which declares that there is no public road through their land. It will be recalled that the interested party, described as Karagita Landing Beach, through their officials, who are named in this application as the 2nd, 3rd and 4th respondents, wished to be enjoined to these proceedings because they acknowledged that they, and the persons that they represent, were the ones who were using the plaintiff's land and that they would be most affected by any decision of this court. It follows that as officials, the 2nd to 4th respondents have a responsibility as the leaders of the group, to ensure that its members abide by the judgment of the court. The complaint that has been presented herein is that the road through the land of the plaintiff is still in use, and if it is, then it is apparent that it is the members of the interested party who are using it.

12. In his reply, the 1st respondent has stated that he has since moved to Kihoto Beach where he operates at the moment. I will come to this a little later as I opt to first deal with the reply of the 2nd to 4th respondents. The 2nd, and 4th respondents, aver in their affidavits that they were voted out of office and they are no longer officials of the interested party. That position contradicts a document that they have annexed, which are minutes of a meeting held by the interested party on 11 May 2018. The said minutes show that David Kilo, the 2nd respondent is the Chairman, Joseph Kamau, the 3rd respondent as Vice Chairman, and Samson Mwangi, the 4th respondent, as Secretary. This meeting, held on 11 May 2018, was held after delivery of the judgment. The depositions in their affidavits that they were voted out of office in the course of these proceedings and that other persons took over the conduct of the suit cannot be true. That position is affirmed by the Court of Appeal ruling on the application for stay of execution which was annexed by the applicants. The ruling refers to an application for stay dated 24 May 2018 filed by Robinson Kuto, David Oduor Kilo, Joseph Kamau Thuo and Samson Mwangi, all of whom are the respondents herein, and they averred to be representatives of the Landing Beach Self Help Group. It is thus apparent that the depositions in their affidavit, that they were not officials of the Group, is a blatant lie. In any event, I have no minutes of any meeting where they were voted out of office, and if this was the case, all they needed to do was annex such minutes and state who the new officials are. I am convinced therefore that the 2nd & 4th respondents have lied on oath about being officials of the group and if they have lied on oath on this issue, I have no reason to believe any of their other depositions. I mentioned that there is no affidavit by the 3rd respondent meaning that he has not contested this application. I am thus persuaded that the 2nd, 3rd and 4th respondent have trashed the judgment of this court and are in contempt.

13. On the 1st respondent, in as much as he claims that he moved to Kihoto Beach and no longer sets foot on the suit land, this is again betrayed by depositions he made while making the application for stay pending appeal. He stated inter alia that the access road in issue is the only access to their source of livelihood and the same should not be closed awaiting hearing of the appeal. In his affidavit in response to this application, he does not state when he moved to Kihoto Beach, and indeed, he has nothing to back up this allegation. My finding, following what he deposed before the Court of Appeal, is that he is also actively in use of the road in the suit land. He is thus guilty of contempt of court.

14. I really wonder what to make of the respondents. There is already a judgment which has pronounced that the suit land does not carry any

public access road. I am unable to imagine how one can go out of his way to simply trash another person's rights. I wonder how the respondents would feel if they were in the shoes of the applicants. I ask them to imagine how they would feel if somebody comes into their homes and evicts them forcefully without having any colour of right, and how they would feel if they came to court, got judgment that they were the rightful owners of the said homes, yet the person they have sued still refuses to move out. What they would feel is what the plaintiffs are now feeling; and it certainly is not a good feeling. No one has any right to trample on another person's right. That is how people live in civilized societies of which I believe we are one. People need to respect pronouncements made by court because these pronouncements determine the rights and obligations of persons. Everyone is under the law and no one should imagine themselves as being above the law.

15. From the above, I do find the respondents guilty of contempt of court. What I tell the respondents is this : **“you are not above the law, and this court, and the civilized Kenyan society, will not allow you to act with impunity and disregard the rights of others.”**

16. The applicants shall appear on a date that I will give so that I can give them a chance to mitigate before sentencing them. I can tell them for free, that it will be a very strong mitigating factor, if at the sentencing hearing, they can come to court having convinced their members and the general public not to interfere any longer with the plaintiffs land, and if the plaintiffs affirm that there is no longer any interference with their land. If I were them, I would be standing guard, shooing and ushering away any person who wishes to pass through the plaintiffs' land, and preaching the gospel that there is no public access road on the plaintiffs' parcel of land. I will also tell them for free, that I have very little sympathy for people who do not obey court orders. It will not be under my watch that impunity and anarchy override the rule of law.

17. The respondents will also bear the costs of this application.

18. Orders accordingly.

Dated, signed and delivered in open court at Nakuru this 30th day of September 2019.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU

In presence of : -

Ms. Kinuthia present for the applicant.

Mr.Tanga holding brief for Mr. Hari Gakinya for respondents.

Court Assistants: Nancy Bor/Alfred Cheron.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU