



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MIGORI

ELC CASE NO. 3 OF 2017

JOSEPH MARWA CHACHA.....PLAINTIFF/APPLICANT

VERSUS

ISAYA TATIRO SERERIA.....DEFENDANT/RESPONDENT

RULING

1. This ruling is in respect of an application by way of notice of motion dated 27th March 2018 and filed in court on 28th March 2018 under section 1(A and B) , 3, 3A & 63(e) of the Civil Procedure Act & Article 159 of the Constitution of Kenya 2010 and Order 40 Rule 3(1), (2) & 3 of the Civil Procedure Rules 2010(Cap 21 Laws of Kenya) and Rule 3 of the High Court (Practice and Procedure) Rules & Section 10 of the Judicature Act (Cap 8). The plaintiff (the applicant) through M/S Nyagesoa and co Advocates is seeking the following orders;

i. Spent.

ii. That, this Honourable court be pleased to grant an order to the applicant to commit the defendant (respondent) to civil jail for disobedience of the court orders of this honourable court dated 8th November 2017.

iii. That, the defendant/respondent to vacate from the sold portion of land measuring 5.3 acres.

iv. That, the OCS Kehancha Police Station to ensure the compliance of these orders.

v. Any other remedy that the court may deem fit and just to grant.

vi. The costs of this application be provided for.

2. The application is premised on a 19-paragraph supporting affidavit sworn by the applicant on even date and accompanying documents namely a copy of a court order dated 8th November 2017 marked as "JMC1" and a copy of affidavit of service sworn on 2nd February 2018 marked as "JMC2". The application is also based on five (5) grounds as follows;-

i. That on 8th November 2017, this honourable court issued temporary orders of injunction restraining the respondent from interfering with the suit property (LR No. Bukira/Bwisaboka/77, the suit land herein).

ii. That the respondent has persisted in disobeying the court orders issued by this honourable court.

iii. That the respondent is in continuous disrespect of the court orders and has threatened to injure the applicant.

iv. That the applicant stands to suffer irreparable loss and damage.

v. That, it is for the interest of natural justice that the orders sought be granted.

3. Briefly the applicant alleges that on 8th November, 2017 a temporary order of injunction was issued by this honourable court against the respondent as shown in document marked as "JMC-1". That on 2nd February, 2018 the said injunctive order was duly served on the respondent on 4th March 2018 as revealed in document marked as "JMC-2". That on 4th March 2018, the respondent in total disregard of the temporary order entered the portion of land measuring 5.3 hectares comprised in the suit land, cleared the bush thereon and started to plough the portion of land in preparation for planting maize crops. The applicant reported the matter at Kehancha Police Station under OB Number

14/4/3/2018 and the respondent was advised by the OCS not to interfere with the portion of suit land but he defied the orders and advice hence precipitating the instant application.

4. In his replying affidavit sworn on 30th July 2017 and filed in court on even date, the respondent through M/s. Odondi Awino and company Advocates, opposed the application. He denied ever having sold the disputed portion of land to the applicant and relied on documents marked as "ITS and 1 to5" which include copies of proceedings and judgment in Kehancha RM's court Criminal case No. 795 of 2014, thus he is likely to suffer double jeopardy herein.

5. On 24th January 2019, the court did direct the parties to argue the application by way of written submissions; see **Order 51 Rule 16 of the Civil Procedure Rules, 2010 and Practice Direction number 33** of the Environment and Land Court Practice Directions, 2014. Learned counsel for the respective parties complied accordingly.

6. By submissions dated 5th March 2019, learned counsel for the applicant urged the court to allow the application and urged that it is trite law that court orders must be obeyed and respected as they are not issued in vain. Counsel submitted that the applicant has established his case against the respondent, who will not suffer any damage if the orders sought in the application are granted. He relied on the case of **Africa Management Communication International Limited v Joseph Mathenge and another (2013) eKLR** in the submissions.

7. On the other hand, in his submissions dated 8th July 2019, learned counsel for the respondent urged the court to dismiss the application with costs to the respondent. Counsel submitted that the application is not signed contrary to **Order 2 Rule 16 of the Civil Procedure Rules, 2010**. That the order marked as "JMC-1" was not extracted and served on the respondent. Counsel relied on the case of **Sam Nyamweya and 3 others v Kenya Premier League Ltd and 2 others (2015) eKRL** on the essence of service of order of injunction with clear and unambiguous terms, among other aspects.

8. I have studied the entire application, the replying affidavit and submissions including authorities cited therein. To that extent, has the applicant established sufficient grounds for the grant of the orders sought in the application?

9. The provisions of the law under the procedure of commencing contempt of court proceedings are well settled (see the Court of Appeal decision in the case of **Christine Wanjiru Evans and 110 others (2014) eKLR**).

10. It is common ground that on 8th November 2017, this court issued a temporary order of injunction against the respondent in order to preserve the suit land LR NO. BUKIRA/BWISABOKA/77 in line with **section 13 (7) (a) Environment and Land Court Act, 2015 (2011)**. The order was issued on 25th January 2018 for service on the respondent.

11. The applicant contends that the respondent disobeyed the said orders hence he be held in contempt of the same. That the applicant stands to suffer irreparable loss or damage if the orders sought in the application are not granted.

12. On his part, the respondent asserts that the application was not signed contrary to Order 2 Rule 16 (supra) and that the order was not extracted. Quite plainly, the application with the supporting affidavit were duly signed by the applicant. As already noted, the orders of the court were issued on 25th January 2018 through the Deputy Registrar of this court.

13. It is apparent that the orders were received by the County Land Registrar, Kuria on 25th January 2017 as per date, signature and stamp on document marked as JMC-1. Similarly, were the orders served on the respondent?

14. This court is aware of the decision of **Romer L.J in Hadkinson –vs- Hadkinson (1952) ALL ER 567** where it was stated, inter alia:-

“That the course of a party knowing of an order which was null and irregular, and who might be affected by it, was plain, he should apply to court that it might be discharged. As long as it exists, it should not be disobeyed.” Per Lord Cottenham L.C in Chuck Vs Crement (1) 1 COOP TEMP COTT 342.”

15. I find a useful guide the decision in **Nyamogo –vs- Kenya Posts and Telecommunications Corporation (1990-1994) EA 464** where it was held that for the court to punish for contempt of court, there must be evidence of service. That a penal notice be endorsed at the foot of the order of penal consequences or obligation thereof.

16. Whereas I note the orders of the court duly issued on 25th January, 2018 and the two (2) authorities cited in the parties' submissions, I find that there is no evidence that the orders were duly served on the respondent as observed in **Nyamweya case (supra)**. Furthermore, the said orders do not bear a penal notice endorsed thereon of the penal consequences and obligation on the parties as recognized in **Nyamogo case (supra)**. The application is want of merit.

17. Accordingly, I disallow the application dated 27th March 2018. Costs be in the cause.

DELIVERED, SIGNED and DATED in open court at **MIGORI** this **18th** day of **SEPTEMBER 2019**.

G.M.A. ONGONDO

JUDGE

In the presence of:-

Ms. E. Apondi learned counsel holding brief for Mr. Nyagesoa for the applicant.

Mr. Odondi Awino learned counsel for the respondent

Tom Maurice – Court Assistant