



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KITALE**

**ELC CASE NO. 53 OF 2016**

**THE FAITH HOMES OF KENYA.....PLAINTIFF**

**VERSUS**

**ROBERT CHERUKOW.....DEFENDANT**

**RULING**

1. The application dated **8/7/2019** and filed in court on **9/7/2019** has been brought by the plaintiff seeking the following orders:

**(1) That this application be certified as urgent and the same be heard *ex-parte* in the first instance.**

**(2) That this court be pleased to cite the defendant herein **ROBERT CHERUKWO** for contempt of court and he be committed to civil jail for six months for having deliberately disobeyed the orders made by this court on **31<sup>st</sup> January, 2018**.**

**(3) That the costs of this application be borne by the defendant.**

2. The application brought under **Section 3A and 63(c) of the Civil Procedure Act, Order 40 Rule 3 of the Civil Procedure Rules 2010**.

3. The grounds on the face of the application are that on **31/1/2018** this court made an order of injunction restraining the defendant, his agents, servants, employees and all persons claiming through him from utilising, entering, fencing and/or undertaking any kind of activities on the suit land namely Land Number 127 at Chepkopegh Group Ranch in Pserum Location in West Pokot County pending the hearing and determination of this suit; that the said order, with a penal notice endorsed thereon, was duly served upon the defendant in person on **3/2/2018**.

4. The application is supported by the affidavit **Deborah Okinda** the Manager of the plaintiff, sworn on **8/7/2019**. That affidavit reiterates the same matters set out in the grounds above.

5. In the supporting affidavit the applicant maintains that the order issued on **31/1/2018** was served together with a penal notice upon the defendant in person. It exhibits a copy of the affidavit of service sworn by one Jackson Nyongesa Simiyu on **3/2/2018**. That affidavit of service states that on **3/2/2018** the process server proceeded to the defendant's home located within Chepkopegh location, Chepareria sub-county of West Pokot County where he met the defendant at **8.30 a.m.** in the company of the area chief and that he served him with a copy of court order and though he accepted service, he declined to sign on the principal copy.

6. It is alleged that contrary to the said order the defendant has through his agent one Joel Ng'olengong entered the suit land and demolished, erected his own fence, locked the door and gate, constructed a structure and threatened members of the plaintiff with unspecified consequences if they do not stay away from the suit land; that the defendant is thus in willful breach of the said order and should be punished for contempt of court. Copies of photographs showing the alleged developments of the suit land by the defendant on the suit land are exhibited in the affidavit. It is alleged that the advocates for the plaintiff served a demand letter seeking that the defendant comply with the order but he refused to do so and resorted to threat against the plaintiff and its members.

7. The respondent filed a replying affidavit dated **24/7/2019**. In his affidavit he depones that the orders of **31/1/2018** were issued *ex-parte* and subsisted with an *ex-parte* judgment which was subsequently set aside at the instant of the defendant; that with the setting aside of the judgment the injunctive orders could not stand alone; that the orders were issued and this suit was commenced while the defendant was still in occupation of the suit land which fact was within the knowledge of the plaintiff and that there is no evidence that he was personally served with the orders.

8. The defendant filed his submissions on **4/9/2019** while the plaintiff did so on **18/9/2019**. I have considered the application and the response including the submissions.

9. The issue that arises for determination in the instant application is whether the defendant is in contempt of the order of court issued on 31/1/2018. That order stated as follows:

**“That an order of temporary injunction be and is hereby issued restraining the defendant/respondent, his agents, servants, employees and/or all those claiming through him from in any manner utilizing, entering, fencing and or undertaking any kind of activities on that portion of land known as land title no. 127 Chepkopeng group ranch and situated within Pserum location in West Pokot County pending the hearing and determination of the suit herein.”**

10. The defendant denies disobedience of the order and advances several grounds against the application, the first being that the orders of 31/1/2018 were issued *ex-parte* and were anchored on the *ex-parte* judgment of this court and that once the judgment was set aside the orders could not hold. Is this the proper position in law?

11. The record shows that a request for judgment for default of appearance and defence was made on 4/4/2016 but when same was presented before the Deputy Registrar she instructed that the matter be fixed for formal proof.

12. The defendant filed a notice of appointment of advocates on 13/2/2018 and followed it up with a notice of motion filed 8/5/2018, seeking that “the interlocutory judgment” against him be set aside and he be allowed to file his defence out of time. That application came before court and was settled by consent whereby the “judgment” was set aside and the defendant was allowed to file a defence within 14 days and that the defendant do pay throw away costs. Nowhere in the consent order is any clause vacating the orders of court issued on 31/1/2018 to be seen. The perceived entry of judgment against the defendant and the application for a temporary injunction were two distinct events. The setting aside of the judgment cannot be presumed to have set aside the orders of temporary injunction of 31/1/2018. The same would persist until set aside by the court at the instance of the defendant.

13. All that the defendant was allowed to do under the terms of his consent was to file his defence to the claim to enable him defend the suit by way of calling evidence in contrast with the situation before then when he was not entitled to call any evidence for want of defence. It is not therefore the correct position as the defendant alleges that the orders were automatically vacated by setting aside of the judgment and the filing of a defence.

14. The second limb of his defence is that he was in actual occupation of the suit land by the time the injunctive orders were issued. That may be so. However, orders that were issued by this court require him not to enter the suit land or conduct any development thereon including fencing, utilizing or undertaking any kind of activities on that land. The plaint dated 8/3/2016 recognizes that the defendant had already trespassed onto the suit property and began digging holes in it while lying claim to the same.

15. The plaintiff’s claims entitlement to a specific portion of plot No. 127 Chepkopegh Group Ranch and has averred that though it was gifted the suit land in 1975 the defendant’s intrusion began in 2015. This court is certain the defendant was aware of the portion that it was restrained from accessing and developing since that was properly demarcated and within use by the plaintiff.

16. Even if the defendant claims to have been in occupation of the suit land by the time of commencement of the suit, he should have obeyed that aspect of the orders that required him to abstain from conducting any development thereon and if dissatisfied sought a review of the same. The fact that the area affected by the order is merely a portion of the entire plot is indicating that the defendant was not desperate for land which to occupy if he complied with the order. The rest of the land was still available and at his disposal.

17. In this case the court’s conclusion is that the defendant was served with the order, knew of the extent to which it limited his activities and proceeded to defy it. The justifications that he has advanced have a fallen flat on their face and so has his defence to the claim of disobedience. I find that the defendant is in contempt of the orders of this court and I convict him accordingly. I further order that he shall appear in this court on **24/10/2019** personally for mitigation and sentencing failure to which his defence filed in the suit shall be deemed automatically struck out and the suit shall proceed to hearing **ex-parte**.

**Dated, signed and delivered at Kitale on this 23<sup>rd</sup> day of October, 2019.**

**MWANGI NJOROGE**

**JUDGE**

**23/10/2019**

Coram:

Before - Mwangi Njoroge, Judge

Court Assistant - Picoty

Mr. Bisonga for the plaintiff

Mr. Kiarie holding brief for Kaosa for the defendant

**COURT**

Ruling read in open court.

**MWANGI NJORGE**

**JUDGE**

**23/10/2019**