



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 113 OF 2018

ISAIAH WANYONYI.....1ST PLAINTIFF
FRED WANJALA MAKOKHA.....2ND PLAINTIFF
WANJALA WEKESA WESELA.....3RD PLAINTIFF
EVERLYNE NANJALA TWANGA.....4TH PLAINTIFF
BENEAH WAUDO.....5TH PLAINTIFF
MARTIN SIKUKU SIMIYU.....6TH PLAINTIFF
CASSIM FELIX WEKESA.....7TH PLAINTIFF
RICHARD SIMIYU WAKHOBELA.....8TH PLAINTIFF
EVANCE MAKOKHA MAKHANU.....9TH PLAINTIFF

VERSUS

NATIONAL MUSEUMS OF KENYA.....1ST DEFENDANT
COUNTY COMMISSIONER
TRANS-NZOIA COUNTY.....2ND DEFENDANT
COUNTY ADMINISTRATION POLICE
COMMANDER TRANS-NZOIA COUNTY.....3RD DEFENDANT
HON. ATTORNEY GENERAL.....4TH DEFENDANT

RULING

1. This is a ruling on the application dated 27/3/2019 and filed in court on 28/3/2019. That application has been brought by the 1st plaintiff seeking the following orders:-

- (a) That this application be certified urgent and service shall be dispensed with in the first instance.
- (b) That leave be granted to the applicant to commence contempt of court proceedings against the Senior Curator - National Museum of Kenya - Kitale.
- (c) That the court be pleased to cite and hold the Senior Curator - National Museum of Kenya - Kitale for contempt of court having contravened the orders of court issued on 18th December, 2018.
- (d) That the court be pleased to punish the Senior Curator - National Museum of Kenya - Kitale to a period of six month in

prison or a fine of Kshs.200,000/=.

(e) That the court be pleased to order the Senior Curator - National Museum of Kenya - Kitale by committing him to prison for a period not exceeding six months or impose a fine of Kshs.200,000/=.

(f) That costs of this application be awarded to the applicant.

2. The application is brought under **Section 1A of the Civil Procedure Act, Order 51 Rule 15, Order 10 Rule 11 Civil Procedure Rules 2010.**

3. The application is supported by the affidavit of the plaintiff sworn on **27/2/2019**. That affidavit reiterates the same matters set out in the grounds at the bottom of the application.

4. The grounds are that the defendant were restrained by court from interfering with the plaintiff's plot known as **UNS Residential Plot No. 2 and UNS Residential Plot No. A**, all in **Block 7 Kitale Municipality**; that the order was served upon the Senior Curator - National Museums of Kenya - Kitale Museum, Office of the County Administration Police Commander and the Office of the County Commissioner on 19/12/2018 and officially stamped on 20/12/2018; that the defendant under tight security constituting of 3 Administration Police Officers and over 10 Kenya Police Reservists (KPR) provided by the County Administration Police Commander and over 20 employees/agents of the respondent continued with the acts forbidden by court order, that is, demolishing the remaining bit of the perimeter wall, placing barbed wire on the poles hence fencing off the 1st plaintiff's backyard and even killing his livestock; that the respondents' actions are flagrant and an outright mockery to the authority of the court; that the respondents' continued disturbance and encroachment is grossly prejudicial to the applicant; that the respondent's actions are calculated at defeating justice by accomplishing their mission which is to take over the applicant's property without following the due process of law; that the order given by court on 19/12/2018 preserved the applicant's investments standing on the suit land; that the respondents have not appealed/reviewed or stayed the orders given by court; that the orders of court must be obeyed by all regardless of stature; that the respondents be ordered to purge their contempt before the court grants them audience and that the fencing off and barricading the applicant's house and homestead is causing gross inconvenience and prejudice.

5. In response to the application, the replying affidavit sworn by **Chole Kizili** the officer in-charge at Kitale Museum on **28/5/2019** and a further affidavit dated **9/9/2019** were filed. In those affidavits he depones that the motion is incurably defective and offends the Judicature Act of the rules of the Supreme Court of English and that the applicant's affidavits are misleading; that the applicant has not identified the alleged contemnor; that the application is a ploy to divert the attention of the court for the real dispute; that none of the officers in the museum disobeyed any court order; that the boundary dispute between the Museum and third parties has a long history; that on **2/8/2019** the County Surveyor Trans-Nzoia determined a dispute between Kitale Museum land and the adjoining plots and it was recommended that the Museum land be fenced whereupon permission was sought from the Director General National Museum of Kenya which permission was granted and fencing commenced on **7/12/2018**; that the wall next to the area claimed by the plaintiff was erected was first to be affected and therefore the wall he had erected on the Museum land was demolished on **10/12/2018** in his presence; that the exhibits to the application do not establish the time the applicant's wall is alleged to have been demolished; that the fencing was complete by **11/12/2019** but thereafter unknown people started interfering with the fence starting the area that had been encroached by the plaintiff which matter was reported to the police on **13/12/2018**; that after that incident was re-fenced and guarded by security officers and that by the time the order is alleged to have been served the area had long been repossessed and *status quo* was that Kitale Museum was already in possession, having fenced it off; that on **22/12/2018** some goons invaded the Museum land and again destroyed the fence which incident was reported to the police and the area was re-fenced and that one Fred Wanjala was arrested and arraigned in **Kitale CM Criminal Court Case No. 5655 of 2018** for offence of malicious damage to the defendant's property; that the consent entered into by the parties on **6/3/2019** recognized that the defendant was in possession; that the applicant never raised any allegations of disobedience of any court order between **20/12/2018** and **6/3/2019** the latter being the date the consent was recorded, and the application having been brought after such inordinate and unreasonable delay must be an afterthought and in bad faith; that in the circumstances no issue of contempt arises; that no leave to commence contempt proceedings was obtained; that no leave to enjoin the deponent was obtained; that no statement of facts was filed as required by law; that no notice was served upon the Attorney General.

6. The defendant filed further affidavit sworn on **9/9/2019**.

7. None of the parties filed any submissions.

8. It is the correct position that this court issued an order on **18/12/2018**, which the defendant does not shy away from acknowledging that it was served on it on **20/12/2018**.

9. The applicant's affidavit supporting the application is the only evidence of the alleged disobedience of the said order. He alleges that after service of the order the defendant continued with the demolition of the remaining part of the applicant's perimeter wall under the supervision of the area chiefs, the administrators of the surrounding locations.

10. It is vital that the alleged disobedience be proved on a balance superior to the balance of probabilities and this can only be by way of the plaintiff's evidence.

11. The defendant's response is that by the time the order was served on it all the required demolition had taken place and the land claimed by the defendant defence off, with the result that unknown persons resorted to sabotage of the works by destroying the fence which matters were reported to the police and at least one suspect apprehended and charged. The defendant points an accusing finger at the applicant alleging that some goons who were used to destroy the fence emanated from his house.

12. A clear timeline is provided by the affidavit of the respondent showing that the boundaries of the land claimed by the defendant were marked out by surveyors on 31/7/2018 and, vide a letter dated 2/8/2018 the surveyor advised the defendant to fence off the land in

accordance with those boundaries.

13. The period between 2/8/2018 and 11/12/2018 was, according to the defendant utilized in securing authority to fence the land and conducting the actual fencing exercise. I find that that period is long enough to accommodate those activities.

14. Such evidence having been placed before it, it is for the applicant to convince this court otherwise.

15. I have examined the evidence given by the applicant and found that as claimed by the respondent the annexures do not fix any timelines showing when the photographs of the demolished wall was taken. In my view those photographs could have been taken at any time before the order was made just as the respondents allege.

16. In my view no contempt has been proved. The applicant's application is also defective for failure to identify any particular person alleged to be guilty of such disobedience for purpose of meting out the appropriate punishment. His application is for orders against the Senior Curator National Museum Kitale and it does not give his name. The person who responded to the application has described himself as officer-in-charge Kitale Museum. To avoid the risk of punishing the wrong person, contempt orders should ordinarily be sought against named individuals. This is for certainty that the right person will be punished. The applicant has not filed any further affidavit to establish that the officer-in-charge Kitale National Museum is the same person as the one who holds the office of Senior Curator National Museums of Kenya Kitale.

17. For the above reasons I find that the above application does not meet the proper threshold of an application for contempt and is hereby dismissed with costs.

Dated, signed and delivered at Kitale on this 16th day of October, 2019.

MWANGI NJOROGE

JUDGE

16/10/2019

Coram:

Before - Mwangi Njoroge, Judge

Court Assistant - Picoty

Mr. Kuria for defendants

Mr. Teti for the plaintiffs

COURT

Ruling read in open court at 2.35 p.m.

MWANGI NJOROGE

JUDGE

16/10/2019