



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT ELDORET

E & L CASE NO. 108 OF 2016

EVANS ORINA ONDICHO.....PLAINTIFF

VERSUS

LUKA KIPCHUMBA KIMELI.....1ST DEFENDANT

PERIS CHEPKEMBOI TUM.....2ND DEFENDANT

RULING

1. **Luka Kipchumba Kimeli**, the 1st defendant, seeks vide the Motion dated 30th April, 2019 to have **Evans Orina Ondicho** and **Peris Chepkemboi Tum**, the 1st and 2nd defendants respectively, committed to civil jail for a period not exceeding six (6) months for contempt of court, or alternatively be punished in some other appropriate way and costs. The application is based on the five grounds on its face marked (i) to (v) and is supported by the affidavit sworn by Luka Kipchumba Kimeli on the 30th April, 2019. The 1st defendant's case is that the other parties have disobeyed the consent order to maintain status quo in respect of Uasin Gishu/Kimumu Settlement Scheme/7563 of 17th October, 2017 by alienating, carrying out construction, structures and maliciously damaging properties and his structures thereon.

2. The application is opposed by the plaintiff through his replying affidavit sworn on the 16th May, 2019 among others, denying disobeying the order through alienating, construction and destroying property and the 1st defendant's structures. That the 1st defendant do not have any structures on the suit land. That he is the one who has been in possession of the suit land but on the 17th April 2019, the 1st defendant and others came to evict him but he resisted. That the 1st defendant is intent in changing the status prevailing on the ground as confirmed by the photographs attached to the application dated 2nd June, 2017.

3. The learned counsel for the defendants and plaintiff filed their written submissions dated the 1st July, 2019 and 12th June, 2019 respectively.

4. The following are the issues for the court's determinations;

(a) Whether the defendants have shown that the plaintiff has disobeyed the court's order.

(b) Who pays the costs?

5. That having considered the grounds on the Motion, the affidavit evidence by both sides, the submissions by the two learned counsels, the court comes to the following findings:

(a) That the order the plaintiff is alleged to have disobeyed was from the grounds on the application and the affidavit in support made on the 17th October, 2017. That the court has had the handwritten proceedings typed and the following is the extract of that day's proceedings:

"17.10.2017:

Coram:

Before Hon. A. Ombwayo, Judge

Komen: Court Assistant

Mr. Kenei holding brief for Omusundi for 1st defendant.

Mr. Momanyi for Plaintiff.

No appearance for 2nd defendant.

Mr. Kenei:

We can take a further mention date.

Court:

Hearing on 16.11.2017. Interim orders extended.”

(b) That the record further shows that prayer 2 of the Motion dated the 29th April, 2016 had been granted *ex parte* on the 18th May, 2016. The said order was extended on the 2nd June 2016, 27th July 2016, 20th July 2017 and lastly on the 17th October, 2017, when the matter was fixed for hearing on the 16th November, 2017. The hearing was then fixed for 4th April, 2018 when the date of 22nd October, 2018 was fixed.

(c) That the hearing of the main suit commenced on the 22nd October, 2018 when the plaintiff testified as PW1. Then one Isaac Shikutwa Mwale testified as PW2 after which the plaintiff closed his case. That a date for defence hearing was fixed for the 9th April, 2019. That the application subject matter of this ruling was then filed.

(d) That the proceedings of 22nd October, 2018 do not contain any extension of the interim orders that had last been extended last on the 17th October 2017 to 16th November 2017. That it is doubtful as to whether there existed any injunction or status quo orders that were capable of being disobeyed by any of the parties by the time the application dated 30th April, 2019 was filed.

(e) That prayer 2 of the Motion dated the 29th April, 2016 which had been granted *ex parte* on the 18th May, 2016 and lastly extended on the 17th October, 2017 to 16th November, 2017 was in the following terms;

“(2). Pending the hearing interpartes and the determination of the application, there be an order of injunction to restrain the 1st respondent, his agents and or servants from evicting the applicant from Land Reference Uasin Gishu/Kimumu Settlement Scheme/7563 or in any way dealing with it.”

The applicant in that application is Evans Orina Ondicho, the plaintiff, and the party being restrained was the 1st defendant. The copy of the order extracted and issued on the 25th May, 2016 is on the record. There is no copy of any other order of 7th October, 2017 or any other date upon which the 1st defendant’s Motion dated 30th April, 2019 seeking for committal to civil jail of the plaintiff and 2nd defendant could have been based upon.

(f) That a party seeking to have the other sanctioned for disobeying a court order has a duty to not only proof the existence of the order alleged to have been disobeyed, but also tender evidence to show and confirm when, how and by whom it has been disobeyed. That the 1st defendant has failed to discharge this legal duty and his application fails.

(g) That the 1st defendant having failed in his application will meet the costs of the application in accordance with **section 27 of the Civil Procedure Act Chapter 21 of Laws of Kenya.**

6. That flowing from the foregoing, the 1st defendant’s Motion dated 30th April, 2019 is found to be without merit and is dismissed with costs. Orders accordingly.

Dated and delivered at Eldoret this 9th day of October, 2019.

S. M. KIBUNJA

JUDGE

Ruling read in open court in the presence of:

No appearance for Plaintiff.

Mr. Langat for Omusundi for 1st Defendant.

Christine: Court Assistant