



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT BUSIA

ELC CIVIL CASE NO. 177 OF 2016

MONICAH NAFULA ADUI.....1ST PLAINTIFF/APPLICANT

JUDITH NERIMA OGOMBE.....2ND PLAINTIFF/APPLICANT

= VERSUS =

LEONARD OTUBA SANYA..... RESPONDENT

RULING

1. The plaintiff/applicant has moved the Court vide his application dated 30/11/2017 and filed on 21/12/2017 seeking for orders that;

i). That the Respondent do show cause why he should not be punished for disobeying or breaching the Court Order granted by this Honourable Court on 4th October 2017 and served on the Defendant on the 7th October 2017.

ii). That the Respondent do pay the Costs of Application.

2. The motion is supported by the joint affidavit of the applicants who deposed briefly thus;

a) That this Honourable Court issued an Order on the 4th October 2017 for a temporary injunction restraining the Defendant from trespassing, entering, cultivating or interfering with the suit lands being Land Parcel Number Samia/Budongo/2277 and Land Parcel Number Samia/Budongo/2278. Herein annexed is a copy of the said Court Order.

b) That the said Court Order was served upon the Defendant on the 7th October 2017. Herein annexed is a copy of the said Affidavit of service.

c) That the Defendant herein has ignored the Court Order and went on to continue constructing on and cultivating on the suit land. Herein annexed are copies of the photographs.

d) That the third parties (applicants to enjoin-this suit) in Paragraph 6 of their Supporting Affidavit for their Application dated 31st July 2017 confirms that the Respondent is in violation of the Order of this Honourable Court issued on 4th October 2017. Herein annexed is a copy of the said Supporting Affidavit.

e) That the Defendant should be punished for contempt of court and be stopped from going on with his action of trespassing and cultivating crops on the suit land until this suit is determined.

3. The application is opposed by the Respondent's replying affidavit sworn on 16th January 2018. The Respondent admitted being aware of the injunctive orders issued on 4th October 2017 and added that he has dutifully complied with the same. The Respondent distinguished that L.R. Samia/Budongo/2577 and 2578 are occupied by over 7 families who are not parties to this suit and who are not claiming the land through him but who the applicants have chosen not to include in this suit. He denied engaging in any development on the suit parcels and urged the Court to lift the Orders against him.

4. Parties filed written submissions in arguing the application. The applicants relied on the Case of *Cecil Miller Vs Jackson Njeru & Ano (2017) eKLR* in support of their submissions. The said Case laid out the elements that must be proved before one is pronounced guilty of contempt as;

- a) *The terms of the order (or injunction or undertaking) were clear and unambiguous and were binding on the Defendant.*
- b) *The Defendant had knowledge of or proper notice of the terms of the order.*
- c) *The Defendant has acted in breach of the terms of the order.*
- d) *The Defendant's conduct was deliberate.*

5. The Applicants submitted that the terms of the order of 4/10/2017 were so clear that the Respondent was in deliberate breach. Since knowledge of the order is admitted, I will only deal with the question whether or not proof has been made of the actions constituting contempt. The Order issued on the 4/10/2017 is annexed to the application. The applicants annexed as number 3 photographs of a house, wall and a person harvesting/burning charcoal. The photographs are undated and the person in the picture is not identified.

6. The Applicants also relied on the facts set out in the affidavit of Kalori Barasa Otuba (annex 5) sworn on 31/7/2017. This affidavit was filed before the order of 4/10/2017 was issued. Further, the Applicants have not explained the relationship between the Respondent and the said Kalori Barasa i.e. whether the said Kalori Barasa was acting on instructions from the Respondent herein. So the affidavit does not add any value to the Application for contempt.

7. Proof of contempt was discussed in the case of *Katsuri Limited Vs Kapurchand Depar Shah Limited (2016) eKLR* where Mativo J stated thus;

"The Courts take the view that where the liberty of the subject is, or might be involved, the breach for which the alleged contemnor is cited must be precisely defined. A contempt of court is an offence of a criminal character. A man may be sent to prison. It must be satisfactorily proved... It must be higher than proof on a balance of probabilities, almost, but not exactly, beyond reasonable doubt. The standard of proof beyond reasonable doubt ought to be left where it belongs, to wit, in criminal cases. It is not safe to extend it to offence, which can be said to be quasi-criminal in nature. However, the guilt has to be proved with such strictness of proof as is consistent with the gravity of the charge... Recourse ought not be had to process of contempt of court in aid of a civil remedy where there is any other method of doing justice. The jurisdiction of committing for contempt being practically arbitrary and unlimited, should be most jealously and carefully watched and exercised with the greatest reluctance and the greatest anxiety on the part of judges to see whether there is no other mode which is not open to the objection of arbitrariness, and which can be brought to bear upon the subject. A judge must be careful to see that the cause cannot be mode of dealing with persons brought before him. Necessary though the jurisdiction may be, it is necessary only in the sense in which extreme measures are sometimes necessary to preserve men's rights, that is, if no other pertinent remedy can be found... Applying the test that the standard of proof should be consistent with the gravity of the alleged contempt..... it is competent for the court where a contempt is threatened or has been committed, and on an application to commit, to take the lenient course of granting an injunction instead of making an order for committal or sequestration, whether the offender is a party to the proceedings or not."

In Peter K. Yego & Others Vs Pauline Nekesa Kode the court recognizing that contempt of court is criminal, held that it must be proved that one has actually disobeyed the court order before one is cited for contempt. The applicant in an application for contempt must prove beyond peradventure that the respondent is guilty of contempt.

8. In the application before me, the applicants have not discharged the burden of proof required of them. I say so because they did not demonstrate to the Court what the Respondent did post the issuance of the order of 4th October 2017. They only made allegations to the Court that the Respondent was in disobedience of the Court order of 4th October 2017. The applicants have not met the standard set out in page 5 of the *Cecil Miller Case supra* i.e. that the defendant acted in breach of the terms of the order by failing to state the acts constituting the contempt as the degree of proof is almost beyond reasonable doubt but definitely higher than on a balance of probability. In light of the high standard of proof set in law for contempt proceedings, I find the current application fails the threshold. It is a candidate for dismissal and I accordingly dismiss it with costs.

Dated, signed and delivered at BUSIA this 11th day of December, 2019.

A. OMOLLO

JUDGE