



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT

AT MIGORI

ELC CASE NO. 238 OF 2017 (OS)

(Formerly Kisii ELC case no. 148 of 2016) (OS)

DAMON OBUDHO AGOLA.....PLAINTIFF

VERSUS

ANJILINA ATIENO OJWANG....1ST DEFENDANT

HENOK ONYANGO OJUANG....2ND DEFENDANT

RULING

1. On 16th April, 2019, the plaintiff/applicant, Damon Obudho Agola (the applicant herein) through M/s Oguttu, Ochwangi and Ochwal and Company Advocates mounted a notice of motion dated 12th April, 2019 (the application) against the defendants/respondents, Anjilina Atieno Ojwang and Henok Onyango Ojuang under Order 40 Rule 3 Civil Procedure Rules 2010 and section 1A,B 3A and 63 (e) Civil Procedure Act (Cap 21). He is seeking orders as follows:-

- i. The Honourable court be pleased to cite and punish the defendants/respondents and for disobeying and/or disregarding the lawful court orders/decrees issued and/or granted on the 15th day of February 2018.
- ii. Consequent to prayer (2) hereinabove being granted, the Honourable court be pleased to issue Warrants of Arrest to bring the defendants/respondents herein before this Honourable court for committal of jail for disobedience.
- iii. Consequent to prayer (3) hereinabove being granted the Honourable court be pleased to commit the defendants/.respondents herein to jail for a duration not exceeding six (6) months and/or such shorter period as the court may deem fit and expedient.
- iv. In the alternative, the Honourable court be pleased to grant an order of sequestration to attach the properties of the 2nd , 3rd and 4th defendants/respondents herein, which properties be sold to defray the damages occasioned by the breach and/or disobedience of the lawful court orders/decrees made on 15th day of February 2018.
- v. Cost of this application be borne by the defendants/respondents.
- vi. Such further and/or other orders be made as the court may deem fit and expedient.

2. The application is premised on the applicant's annexed affidavit of 25 paragraphs sworn on 12th April, 2019 and copies of documents marked as "DOA 1 to DOA 5" which include an order of this court issued on 8th March 2018 (DOA1), the applicant's title deed in respect of the suit land, LR NO. Kabondo/Kakangutu East/ 1596 issued on 25th September 2018 (DOA 3) and photographs showing the extent of trespass by the respondents on the suit land (DOA5). The applicant averred, inter alia, that on 15th February 2018, this court rendered Judgment in favour of the applicant. That the respondents were duly served with DOA1, namely an order that the applicant is to recover the whole of the suit land and he be registered as it's proprietor. That the respondents have trespassed into the suit land by cultivating the same hence violated "DOA 1". That he is bound to suffer irreparable prejudice if the orders sought in the application are not granted.

3. The application is further premised on grounds (a) to (w) set out on it's face. The grounds include that the respondents have commenced activities on the suit land yet "DOA 1" was clear, explicit and unequivocal. That the actions of the respondents constitute disobedience of lawful court orders and that in the interest of justice, the respondents be cited and punished accordingly.

4. In his 9 –paragraphed replying affidavit sworn on 26th June 2019 and filed in court on even date, the 2nd respondent for and on behalf of the 1st respondent and himself, deponed that he has all along been in possession of the suit land before and even after the court rendered Judgment on 15th February 2019. That an application by way of a notice of motion dated 20th February 2019 is still pending before this court.
5. The respondents further stated that on 25th February 2019, this court ordered that the status quo in respect of the suit land be maintained by both parties as shown in order marked as “H001”. That the application is brought in bad faith, geared towards delaying this matter, lacks merit and that it be dismissed with costs.
6. On 26th June 2019, this court directed that the application be argued by written submissions; see **Order 51 Rule 16 of the Civil Procedure Rules, 2010 and Practice Direction number 33 (a) and (b) of the Environment and Land Court Practice Directions, 2014.**
7. Accordingly, the applicant’s learned counsel filed submissions dated 7th August, 2019 whereby counsel gave the background of the matter and referred to annexures “DOA” at page 100 of the applicant’s supporting affidavit. Counsel also identified issues (a) to (c) for determination at paragraph 16 of the submissions, analysed the said issues and urged this court to allow the orders sought in the application.
8. To buttress the submissions, learned counsel for the applicant further relied on the following authorities;-
- a. Mutitika –vs- Baharine farm Ltd (1985) KLR** on the standard of proof in contempt matters.
 - b. Beldina Mokaya –vs- Robert Ombaso Nyareru and another Kisii HCCC No. 90 of 2007 (UR)** with regard to the necessity to obey court orders.
9. The 1st and 2nd respondents appear in person. They failed to file and serve their submissions within the timelines as ordered on 26th June 2019.
10. I have thoroughly studied the application in its entirety, the replying affidavit and the applicant’s submissions including issues (a) to (c) framed therein for this court’s determination. Thus, I find the said issues sound and embrace them accordingly. For the avoidance of doubt, the three (3) issues are ;-
- i. Whether the orders granted by the Honourable court were explicit, unequivocal and devoid of ambiguity.**
 - ii. Whether the defendants /respondents were served with and/or were knowledgeable the orders of the court rendered on the 15th February 2018.**
 - iii. Whether the defendants/respondents have disobeyed, disregarded and/or otherwise ignored the court order.**
11. As regards the 1st issue, it is common ground that this court rendered Judgment in favour of the applicant on 15th February 2019. As a result, a decree in terms of orders (a) to (e) and marked as DOA1 was issued on 8th March 2019. The orders are revealed in the Judgment at paragraphs 1 and 16 and the decree. They were very explicit in this suit.
12. In respect of the 2nd issue, learned counsel for the applicant submitted that the respondents were personally served with the orders of 15th February 2018 as shown at paragraph 7 of the applicant’s supporting affidavit and an affidavit of service sworn on 30th March 2018 by Joshua Otieno Okeyo a duly licenced court process server. The applicant asserted that the respondents were fully aware of the Judgment and orders of the court made on 15th February 2018.
13. The 2nd respondent stated that he sought review and or setting aside of the said Judgment by his application dated 20th February 2019 which was fixed for inter partes hearing on 26th June 2019 and is still pending determination before this court. So, the respondents were fully aware of the said orders issued by this court.
14. On the 3rd issue, the applicant craves for punishment of the respondents on allegations that they disobeyed the orders of the court rendered on 15th February 2018. That the respondents are still intent of carrying out offensive activities on the suit land. That the activities or conduct of the respondents are bound to set a dangerous precedent militating against the administration of justice and the Rule of Law in general and has bought the dignity of this court into dispute.
15. On the other hand, the respondents stated that on 20th February 2019, the court ordered the maintenance of the status quo in respect of the suit land LR NO. Kabondo / Kakajulu East/1596. That the orders of this court have not been disobeyed at all.
16. I note that on 26th June 2019, the parties represented by their respective counsel agreed that the instant application be heard earlier than the respondent’s application dated 20th February 2019. I consider the orders rendered on 15th July 2018, the orders of 26th June 2019 and orders sought herein. It is abundantly clear that the respondents reacted to the Judgment and orders made on 15th February 2018 by filing and service of their application dated 20th February 2019. Quite plainly, status quo orders were granted on 25th February 2019 by this court.
17. In the case of **Ogada –vs- Mollin (2009) KLR 620 at 635** in paragraph 35, the Court of Appeal held that :-

“The doctrine of lis pendens is meant to maintain the status quo over the property which is the subject matter of a pending suit until after the final determination of the suit or until the suit is in any other manner terminated.” *(emphasis supplied)*

18. In the **Black’s Law Dictionary 10th** Edition, the term “**status quo**” means:-

“The situation that currently exists.”

19. I do not lose sight of the decision in **Mutitika and Mokaya cases (supra)** regarding knowledge and need to obey court orders. In view of the respondent’s application dated 20th February 2018 which was timeously filed and the status quo ordered by the court on 25th February 2019, it can not be perfectly concluded that the respondents disobeyed the orders of the court rendered on 15th February 2018 as alleged in the instant application.

20. Wherefore, it is the finding of this court that the application by way of notice of motion dated 12th April, 2019 and filed on court on 16th April, 2019 is devoid of merits. I proceed to dismiss the same with costs in the cause.

Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 3rd day of DECEMBER 2019.

G.M.A. ONGONDO

JUDGE

In the presence of: -

Ms E. Apondi holding brief for Mr. D. Adawo learned counsel for the plaintiff/applicant.

Tom Maurice – Court Assistant.