



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 126 OF 2017**

**WILLIAM MATELONG.....PLAINTIFF**

**VERSUS**

**THE CHAIRMAN BOG**

**AIC KAPKOI SISAL SEC. SCHOOL.....1<sup>ST</sup> DEFENDANT**

**DAVID BUNDOTICH.....2<sup>ND</sup> DEFENDANT**

**THE CHIEF LAND REGISTRAR**

**TRANS-NZOIA COUNTY.....3<sup>RD</sup> DEFENDANT**

**RULING**

1. The application dated **15/8/2019** and filed in court on **16/8/2019** has been brought by the plaintiff/applicant seeking the following orders:

**(1) That this application be certified as urgent and the same be heard on priority basis.**

**(2) That an ex parte order be granted for leave to cite the defendants/respondents for contempt of court order issued on 27/2/2019.**

**(3) That an order for committal be made against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants/respondents herein, to prison for such period as this court may deem fit and just because the said defendants/respondents have disobeyed the order made by this court on the 27/2/2019 inter alia:**

**(a) Allowing the plaintiff six months to remove his assets from the suit property.**

**(4) That an order that costs of these contempt proceedings be borne by the defendants/respondents.**

2. The application is brought under **Section 5(1) of the Judicature Act Cap 8 Laws of Kenya, Order 52 Rule 3 of the Rules of the Supreme Court of England 1965.**

3. The grounds on the face of the application are that there is an order dated **27/2/2019** ordering the defendants to allow the plaintiff to remove his assets from the suit land within six months; that the order was served upon the defendants; that the defendants have restrained the plaintiff from entering the suit property and removing his assets in breach of the court order; that the court's authority and efficacy of the suit orders is being put to test and that there is need to urgently stop the defendants from breaching the court order.

4. The application is supported by the affidavit of the plaintiff, sworn on **15/8/2019**. In that affidavit the plaintiff maintains that on **27/6/2019** the order was served upon the defendants' advocates who acknowledged the same by way of affixing their official stamp upon the face of the order; that however the respondents have since the order restrained the applicant from accessing his assets situate thereon; that notwithstanding the Attorney General's letter dated **3/7/2019** the respondents have persisted in such refusal

5. The 1<sup>st</sup> defendant filed a replying affidavit dated **1/10/2019**. In his affidavit he depones that he is the Chairman Board of Management AIC Kapkoi Sisal Secondary School; that the application is defective and incompetent; that the plaintiff has never executed the order and has never visited the school or approached the school management committee for the purpose of retrieving his assets; that there are no known assets belonging to the applicant in the school premises; that there are no structures or items of the plot save the blue gum trees on the lower side of the school which do not belong to the applicant but the school having been planted by the management committee of the now defunct

cattle dip; that the supporting affidavit does not identify who was requested to assist the applicant with the execution of the court order; that no identity of the person served with the court order is given; that the 1<sup>st</sup> defendant is an institution incapable of disobeying a court order and that personal service of the order upon the officers of the 1<sup>st</sup> defendant has not been demonstrated.

6. The 2<sup>nd</sup> defendant filed a replying affidavit dated **4/10/2019**. He deponed that he has never restrained the applicant from entering the suit land or removing his alleged assets therefrom; that he has no interest in the suit land and has not occupied it; that the order dated **27/2/2019** was not served on him personally and that being a law abiding citizen would not disobey a court order.

7. In reply to both the replying affidavit by the 1<sup>st</sup> and 2<sup>nd</sup> defendants the plaintiff filed further affidavit dated **17/10/2019** and deponed that all the parties including the 1<sup>st</sup> defendant and his advocate were present when the order was issued **24/6/2019** and were aware that his assets on the land included a building, tools of trade and eucalyptus trees; that **Waitaluk/Kapkoï Block 10 (Kapkoï Sisal)/35** and **Waitaluk/Kapkoï Block 10 (Kapkoï Sisal)/1802A/R** are two separate plot and the 1<sup>st</sup> and 2<sup>nd</sup> respondents have already fenced the latter plot and any entry requires to be communicated to the 1<sup>st</sup> respondent; that the 2<sup>nd</sup> defendant has already built a house on the latter plot; that attempts to executed the order has been thwarted by the bureaucratic procedure the 1<sup>st</sup> defendant subjected him to; that when the applicant approached the deputy principal he was denied entry and when he sought help from state counsel the latter directed him to the Chief; that the state counsel's letter allowing him to remove his assets denied him the removal of eucalyptus trees; that the 1<sup>st</sup> respondent also asked the applicant to wait for board consultation and also directed him to speak with one Cyrus Yego whose role in the matter is not clear and that all such actions of the 1<sup>st</sup> defendant amount to contempt of court.

8. The applicant filed his submissions on **17/10/2019**. The respondents never filed submissions. I have considered the application and the response including the filed submissions.

9. In his submissions the applicant relied on several cases: **Elphas Oduor Omondi -vs- Orange Democratic Movement & 5 Other [2017] eKLR: Shimmers Plaza Ltd -vs-National Bank of Kenya Ltd [2015] eKLR and Basil Criticos -vs- Attorney general & 8 Others [2012] eKLR.**

10. The issue that arises for determination in the instant application is whether the defendants are in contempt of the order of court issued on **26/6/2019**. That order stated as follows:

**“(1) That the suit be and is hereby marked as withdrawn with no orders as to costs**

**(2) That the plaintiff is hereby allowed six months he desires to remove his assets from the suit land.”**

11. It would appear that the applicant has serious concerns about the possibility that the 2<sup>nd</sup> defendant is interested in acquiring the suit land but that, though a serious issue in the light of the expression of the parties that the land belongs to the school, is not to be tried here. The issue here is whether the applicant has proved contempt against the respondents. I must state that in my view no allusion is made to the disobedience of the court order by the 3<sup>rd</sup> respondent and this application will be dealt with only in regard to the 1<sup>st</sup> and the 2<sup>nd</sup> respondent.

12. In toto the submission of the applicant is that the 1<sup>st</sup> and the 2<sup>nd</sup> respondents have either expressly or impliedly by way of raising a loty of red tape or bureaucracy blocked him from ingress into the suit premises for the purpose of collecting his belongings. It would appear that the belief of the applicant is that these items include the now mature trees on the suit land which in his opinion must be harvested. I must immediately disabuse the applicant's notion that the order of this court specifically addressed the trees in question; the same dealt with the personal belongings of the applicant. From a perusal of the record I am certain that the applicant is quite mistaken if he is of the view that the trees were part of that order. Whether the same belong to him or not was not a matter that was subjected to consideration and expression by this court at the time of the order. However he is entitled to the other items that can be proved to belong to him which are in the premises. In that regard has he established that he was, first, that he sought to enter the premises and, secondly, was denied or blocked from entering the premises to retrieve the alleged items? It is the opinion of the 1<sup>st</sup> respondent that there are no known assets of the applicant within the premises, and that the mature eucalyptus trees standing on the premises were planted by the cattle dip management committee. However, whether there are items or not remaining on the premises is of no importance in this case at the moment; what is of importance is whether the applicant was allowed to enter the premises and ascertain that they are there in the first place.

13. It is clear that the 1<sup>st</sup> and 2<sup>nd</sup> respondents were aware of the court order in question. Therefore whether the order was served or not I find that their knowledge thereof is not in issue, their advocate having been present at the time the said order was issued.

14. Next, I seek evidence of express or implicit denial of entry which may constitute contempt of court.

15. The applicant does not mention any dates on which he visited the land in his supporting affidavit. He only states in general terms that he was restrained from accessing the suit land to recover his assets. In the supplementary affidavit he gives an account of the bureaucratic restraints to his access to the premises. Unnecessary bureaucratic restraints may result in a finding of contempt in some instances. However, where bureaucratic restraints are cited, the court must deal with them on a case to case basis. Evidence that the applicant attempted to comply with the step by step demands of the respondents but failed for the reason that they were unreasonable may be admissible to establish that such were deliberately erected to block effectuation of the court order. However, I find such alleged bureaucratic restraints insufficient to prove the offence of contempt in the context of this matter.

16. That said, and having regard to all that is stated by the parties in their documents I find that the order should have been obeyed by whoever was in charge of the premises and that is the 1<sup>st</sup> defendant Board.

17. I am not certain that I can understand why the Board, having knowledge of the order would not invite the applicant in the presence of witnesses and give him whatever was his that is on the premises; however save the chairman whose responses show that he is fully conversant with the order and the other matters herein, I am unable to identify the particular members of the board that were consulted in this matter as they have not been enjoined by name; these being quasi-criminal proceedings, issuance of the orders sought would therefore not safe.

18. In the final analysis I find that I must decline the orders sought by the applicant in the application dated **15/8/2019** and in lieu thereof make orders as follows:

**(a) All the members of the full board of management of the school together with the 2<sup>nd</sup> defendant, David Bundotich, must without any exception appear before this court on Thursday 5<sup>th</sup> December 2019 at 9.00 am to explain what has hindered them from allowing the applicant to collect his assets from the suit premises.**

**(b) The costs of the application shall be borne by the 1<sup>st</sup> and 2<sup>nd</sup> defendants.**

It is so ordered.

**Dated, signed and delivered at Kitale on this 3<sup>rd</sup> day of December, 2019.**

**MWANGI NJOROGE**

**JUDGE**

**3/12/2019**

Coram:

Before - Mwangi Njoroge, Judge

Court Assistant - Picoty

Mr. Kuria for 1<sup>st</sup> and 2<sup>nd</sup> defendants

Plaintiff in person present

(Mr. Kuria for 3<sup>rd</sup> defendant also)

**COURT**

Ruling delivered in open court.

**MWANGI NJOROGE**

**JUDGE**

**3/12/2019.**