



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAROK

ELC CAUSE NO. 368 OF 2017

FORMERLY KISII ELC CAUSE NO. 1276 OF 2016

ERICK SAITOTI LATON PLAINTIFF

-VERSUS-

JAMES LATON KONCHELLA DEFENDANT

RULING

The Application before the court is a Notice of Motion dated 8th February, 2017 and was brought by the Plaintiff/Applicant under order 40 rule 3 (1),(2) and 3 of the Civil procedure Rules and under section 3, 3A and 63 (E) of the Civil Procedure Act where the Applicant seeks for orders that the 2nd Respondent be committed to Civil Jail for the disobedience of a court order that was issued on 29th December, 2016 and that the OCS Kilgoris police station do ensure compliance of the orders sought and costs be provided for.

The Application was based on several grounds enumerated on the face of the Application namely that the 2nd Respondent was issued with an order that had an accompanying Penal Notice which was duly served upon him but he did not heed the same and went ahead and caused the arrest of the 2nd and 3rd Applicants on 3rd January, 2017 subsequent to which they were arraigned before court and charged with offence of forceful detainer and demolition of property.

The Applicant contends that the 2nd Respondent has continued to disregard the court and continue to gain from the persistence of his disregard and as a result continued to plant trees and cultivate the suit land and hence the Applicant seeks this court to punish the 2nd Respondent by committing him to civil jail.

The Application and the grounds upon which it was premised was supported by the Affidavit of Eric Saitoti Laton which was filed in court on 8th February, 2017. In the said Affidavit the Applicants enumerated and expounded on the grounds aforesaid and reiterated that the 2nd Respondent caused the arrest of the 2nd and 3rd Applicants and that there is continuance disregard of the order.

The Applicants have in support of the affidavit annexed to the affidavit of service, a copy of the court order that the 2nd Respondent is alleged to have disobeyed together with a charge sheet and photographs showing that the Respondent alleges to be fencing poles destroyed by the 2nd Respondent.

The 2nd Respondent has opposed the said Application by way of filing a Replying Affidavit where he categorically averred that he is not in contempt of the court's order as alleged by the Applicant.

The 2nd Respondent in response to the allegation that he trespassed on the land avers that he reported to Kilgoris police station when the Applicant's trespassed on his land subsequent to which they were arrested, investigated and charged by the police an act which he did not have control as the power to arrest and charge is vested in the police.

The 2nd Respondent avers that he is in actual possession and occupation of the suit land and therefore the order did not restrain him from protecting acts of trespass or acts which were injuries to his quiet enjoyment of the suit land. He further avers that the Applicant has not moved to the High Court to prohibit there prosecution if the same was actuated by malice.

The 2nd Respondent further averred the Applicants have not come to court with clean hands as they misled the court into believing that they are in occupation of the land when they are not.

When the matter came before me for hearing learned counsel representing the parties consented that the Application be disposed of by way of written submissions to which they both did.

Having read the application before me together with the supporting affidavit and the submissions filed together with the replying affidavit filed by the Respondent the issue before me is to determine whether there was an order of the court that was issued, was the order served upon the 2nd Respondent and did the 2nd Respondent frankly disobey the order of the court.

It is not disputed by the parties that there was an order of the court that restrained the Respondent from entering, cultivating and carrying out various acts that were dated on the 29th December, 2016 and it is not further disputed that the said order was served.

The Applicants in the Application have based their Application for committal to civil jail of the 2nd Respondent on the basis that he caused their arrest and prosecution. I have looked at the order that was issued by the court and I have not seen any order banning the Respondent from reporting any acts carried out by the Applicant. Moreover I take Judicial Notice of the fact that the power to arrest and prosecute an individual is not vested in a private citizen for an act of trespass the respondent in reply has stated that it was after the Applicant trespassed on his land that he reported the act of trespass and he did not have any control. I think to blame him for his acts and insinuate the same as disobedience of the order of the court issued on 29th December, 2016 is far-fetched.

Committal to civil jail curtails an individual's liberty and freedom as enshrined in the constitution and party seeking to curtail this freedom because the committal must discharge his burden of proof and in the instant case am not convinced that the Applicants have discharged that burden adequately and conclusively.

As to other grounds that the 2nd Respondent continues to disregard the court order the applicants have not disclosed to this court who is in occupation of the suit land. The Respondent avers that the Applicants have come before the court with unclean hand as he avers that he is in possession and occupation of the suit land a fact that the Applicants did not disclose. This being a court of equity he who seeks its interaction must come before it with clean hands. The Applicants by failing to disclose the above are guilty of non-disclosure of material facts.

The upshot of the above is that the Application dated 8th February, 2017 to commit the 2nd Respondent is unmerited and I dismiss the same with costs.

Orders accordingly.

DATED, SIGNED and DELIVERED in open court at **NAROK** on this **26th** day of **JANUARY, 2018**

Mohammed Noor Kullow

Judge

26/1/18

In the presence of:

N/A for parties

Mohamed Noor Kullow

Judge

26/1/18