



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

E.L.C NO. 308 OF 2017

ROBINSON KIANO WANGENYE - PLAINTIFF/APPLICANT

VS

STANLEY KAMAU CHEGE - 1ST DEFENDANT/RESPONDENT

CHAIRMAN LAND CONTROL

BOARD KAHURO - 2ND DEFENDANT/RESPONDENT

LAND REGISTRAR MURANG'A

COUNTY - 3RD DEFENDANT/RESPONDENT

RULING

1. By a Notice of Motion dated 14/7/17 the Applicant moved the Court under the Provisions of Section 5 (1) of the Judicature Act Cap 8 Laws of Kenya, Order 51 Rule 1 of the Civil Procedure Rules 2010, Order 52 Rule 2 of the Supreme Court of England 1965, Section 3(a) and 63(e) of the Civil Procedure Rules and all enabling provisions of the law seeking an Order of committal to prison against the 1st Defendant/Respondent for a period of 6 months or such other period as the Court may deem fit and just for blatant disobedience of a valid Court Order issued on 17th July (the date appears incomplete).I have reviewed the said Orders issued by the Hon. Lady Justice Waithaka and note that they were issued on 14/7/16 and certified by the Deputy Registrar on 28/7/16 and not the 17th July as stated in the application. I take it as error on the face of the application and shall refer to the Order as that of 14/7/16.

2. The Applicant depones in his Supporting Affidavit that despite service of the said Order on the 1st Defendant through his Advocates Ms. Keli & Mwaura Advocate on 8/7/16, the 1st Defendant failed to obey the Order by continuing to farm on the portion where the family graves are located(hereinafter referred to as the graveyard). He avers that the 1st Defendant has planted coffee trees on the grave yard and removed the crosses on the graves. That these acts are in disobedience of the aforesaid Court Order.

3. The 1st Defendant filed a replying affidavit in which he acknowledged the Court Order barring him from farming on the graveyard and stated that he has not disobeyed the said Order. In particular he states that during the subsistence of the Court Order neither he nor his servants have farmed on the grave yard, removed the crosses nor planted trees thereon.

4. Julius Kamau Mwangi, the farm worker on the suit land and employed by the 1st Defendant deponed that on 22/2/17 while working on the suit land, he witnessed the Applicant, his two brothers and their

respective wives and a sister digging and cultivating around the grave yard whilst a photographer took pictures. That subsequently he managed to get copies of the photographs which are annexed. On noticing him the Applicant and his entourage advised him to inform the 1st Defendant not to cultivate on the grave yard and hurriedly left the site. That the Applicant had unhindered access to the grave yard and no hired goons repulsed him and his relatives. Further he deponed that at no time did he farm on the grave yard after the issuance of the Order as he had been explained to by the 1st Defendant. That it is the Applicant and his relatives who clandestinely entered the suit property (grave yard) dug around and destroyed the area around it and not the 1st Defendant, or his agents/servants.

5. In a Subsequent rejoinder, the Applicant stated that in the month of August 2016 the 1st Defendant deliberately destroyed the entire graveyard by removing crosses of the graves and planted fresh coffee trees on top of the graves. He maintained that the 1st Defendant has denied him access using hired goons, one of them being the farm worker who has been positioned to deny him access at the grave yard. In further response the Applicant admitted being present at the grave yard with his relatives but denied digging the grave yard and avers that they were chased away by the hired goons on site.

6. I have also considered the supplementary affidavit sworn by Geoffrey Kimone Wangenye in support of the Applicants position which reiterates the averments made by the Applicant in all respects.

7. I have carefully read and considered the parties pleadings together with their written submissions and legal precedent were relevant.

8. Contempt of Court is defined under section 4 of the contempt of Court Act No. 46 of 2016 as follows;-

“(1) Contempt of Court includes — (a) civil contempt which means willful disobedience of any judgment, decree, irection, Order, or other process of a Court or willful breach of an undertaking given to a Court; (b) criminal contempt which means the publication, whether by words, spoken or written, by signs, visible representation, or otherwise, of any matters or the doing of any other act which — (i) scandalizes or tends to scandalize, or lowers or tends to lower the judicial authority or dignity of the Court; (ii) prejudices, or interferes or tends to interfere with, the due course of any judicial proceeding; or (iii) interferes or tends to interfere with, or obstructs or tends to obstruct the administration of justice.

(2) In any case not relating to civil or criminal proceedings as contemplated under subsection (1), an act that is willfully committed to interfere, obstruct or interrupt the due process of the administration of justice in relation to any Court, or to lower the authority of a Court, or to scandalize a judge, judicial officer in relation to any proceedings before the Court, on any other manner constitutes contempt of Court.”

Section 5(b) of the aforesaid Act gives this Court the power to punish for contempt of Court.

9. I note that the above Act came into force on 13/1/17 however section 5 of the Judicature Act equally gives this Court the power to punish for contempt of Court. Section 5 of the Judicature Act has now been repealed by section 38 of the Contempt of Court Act. Since the alleged contempt was committed before the commencement of the Act, it is safe to rely on the earlier provision of Section 5 of the Judicature Act.

10. Section 63(C) of the Civil Procedure Act provides as follows;-

“In order to prevent the ends of justice from being defeated, the Court may, if it is so prescribed—

(a)

(b)

(c) grant a temporary injunction and in case of disobedience commit the person guilty thereof to

prison and order that his property be attached and sold.”

Order 40 rule 3 of the Civil Procedure Rules provides the consequences of contempt which includes in case of disobedience or breach of any terms of Court Order, an order for the property of the person guilty of such disobedience or breach to be attached and may also Order such person to be detained in prison for a term not exceeding 6 months. This goes to show that the punishment for contempt is not light, other than attachment of the property of the guilty contemnor, his liberty is also at stake.

11. Black’s Law Dictionary , 9th Edition at page 360 defines contempt as follows;

“Contempt is a disregard of, disobedience to, the rules, or Orders of a legislative or judicial body, or an interruption of its proceedings by disorderly behaviour or insolent language, in its presence or so near thereto as to disturb the proceedings or to impair the respect due to such a body.”

Contempt is necessary for maintenance of law and Order and so that the dignity of the Courts is upheld. It is trite law that every person against whom a Court Order is made against has unqualified obligation to obey the Order however unpalatable the Order may be until or unless the Order is discharged or set aside. See **Econet Wireless Kenya Ltd vs. Minister for information & Communication of Kenya & Another [2005] 1 KLR 828 .**

12. The Applicant is duly bound to prove the following 4 elements to succeed in a contempt of Court application;-

- 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; and
- d) the Defendant’s conduct was deliberate.

13. It is also trite law that the standard of proof in contempt is higher than that of Civil Cases, but lower than the standard of beyond reasonable doubt as required in criminal proceedings.

14. The Court Order complained of is worded as follows;-

- a) “That the Orders granted on 19th May 2016 be and are hereby confirmed pending the hearing and determination of this suit.
- b) That in addition the 1st Defendant is restrained from farming on the portions where the family graves are located.
- c) That parties to comply with Order II and take a date for pretrial when this is done”.

15. In the instance case it is not in dispute that the 1st Defendant had knowledge of the Court Order. In para 3 of his replying affidavit the 1st Defendant duly acknowledged the existence of the Court Order issued on 19/5/16 maintaining status quo and the further Order dated 14/7/16 barring him from cultivating on the portion containing the family graves.The Order was by consent of the parties and therefore there may have been no need for service. I did not see any evidence of service. The Order has been acknowledged and therefore notice of the same is not in issue.

16. It is also evident that the terms of the said Order were not only clear unambiguous and binding on the 1st Defendant. The 1st Defendant has stated in Para 3 of his Replying Affidavit that;

“That it’s true that Interim Orders issued on 19th May 2016 were confirmed amongst other Orders to the effect that *status quo* be maintained and the status obtaining at the time was that I was in actual occupation of the land and would so continue to utilize the land save for farming on the portion where the family graves are located which I have jealously obeyed.”

17. What is in issue in my view is whether the Applicant has proved the actual disobedience of the 1st Defendant against the Orders; In the case of **Peter Yiego vs Pauline Nekesa Kode [2010] eKLR** the Court held that since contempt of Court is quasi-criminal in nature, it must be proved by whoever is alleging it. The onus therefore rests on the Applicant to prove that the 1st Defendant disobeyed the Order.

18. In the instant case the Applicant and his brother one Geoffrey Kimone Wangenye have placed the time of August 2016 as the time when the 1st Defendant deliberately destroyed the entire grave yard by removing the crosses on the graves and planting fresh coffee trees on top of the graves after the consent Orders. He has attached photographs to support his assertion. It is however not clear who exactly cultivated the grave yard. The photographs are inconclusive as to whether the apparent earth was dug by the 1st Defendant or someone else. Further there is no evidence to show the exact position of the graves on the pictures before they were dug and after. The 1st Defendant and the farm worker have stated that the Plaintiff and his relatives visited the grave yard in February 2016 and were found digging. This visit has been admitted by the Applicant though he denies digging or cultivating the grave yard as they had only 3 minutes to leave the grounds after they were allegedly repulsed by hired goons. No evidence has been adduced by the Applicant to attribute the cultivation of the grave yard to the 1st Defendant. Neither has any evidence adduced to show that the alleged attack by hired goons was reported to the police. The Applicant has failed to prove that it is the 1st Defendant that dug up the graveyard and thus breached the Court order nor that he acted in deliberate breach of the order.

19. For the foregoing reason I am not satisfied that the standard of proof has been attained to show that the 1st Defendant did disobey the Court Order issued on 14/7/16 and therefore the application dated 14/7/17 is hereby dismissed with no Orders as to costs.

20. Parties being related, each to bear their costs of the application.

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 25TH DAY OF JANUARY 2018

J G KEMEI

JUDG