



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 111 OF 2008

MESO MULTI-PURPOSE SOCIETY LTD.....PLAINTIFF

VERSUS

LUORE NYAIRO COMPANY LTD.....1ST DEFENDANT

M/S AGRICULTURAL FINANCE CORPORATION..2ND DEFENDANT

CHIEF LAND REGISTRAR..... 3RD DEFENDANT

THE HON. ATTORNEY GENERAL..... 4TH DEFENDANT

R U L I N G

1. The application dated 4/11/2016 has been brought by the 1st defendant. It seeks the following orders:-

- (1) This application be certified urgent and the same be heard ex-parte in the first instance.**
- (2) The Chairman of the plaintiff/respondent namely FRANCIS WAFULA, the Secretary of the plaintiff/respondent namely PATRICK SIMIYU MUMIA and the Treasurer of the plaintiff/respondent namely JUSTUS WANYAMA be committed to civil jail for a period of six months for willfully disobeying the orders made by this Honourable Court (the Honourable Justice Ombija) on 17th December, 2009.**
- (3) The plaintiff/respondent be ordered to purge the contempt.**
- (4) The costs of this application be borne by the plaintiff/respondent.**

2. The grounds on which the application is made are that on **17/12/2010** the court ordered the status quo to be maintained and the respondent has knowledge of that order. Despite that order of the court the respondent is said to have invaded a portion of the said land and unlawfully evicted the 1st defendant from the suit land. It is also alleged that the plaintiff is now subdividing, ploughing, planting and erecting structures on the suit land. The disobedience of the plaintiff is said to be willful and will render this court's orders to be in vain.

3. The application is supported by the affidavits of Barry Odongo Okundi who is said to be an agent of the 1st defendant, Stephen Kariuki Njoroge, who is said to have leased land from Mr. Okundi, and Joseph Elila who is said to have been caretaker of LR No. 7060/4 from the year 2005.

4. The sum total of the evidence from the three affidavits in support of the application is that Mr. Okundi had leased 100 acres to Mr. Njoroge.

5. In the affidavit of Mr. Njoroge he states that he leased 100 acres from Mr. Okundi on 26/5/2016. Prior to that event, he says, there was nobody in occupation of the land except another lessee before him. He states that in January, 2016 he ploughed the land but when he went back to replough the land in March, 2016 some people whom he presumes to be the plaintiff agents who numbered more than 50 and who were armed with crude weapons arrived at the suit land and threatened him with violence if he continued to plough the land. The exercise was therefore halted when he had ploughed only 30 acres of land. When the police were called, the group of invaders overpowered them and the ploughing had to completely cease.

6. The affidavit of Joseph Elila states that Mr. Njoroge had leased the land from Mr. Okundi but on 2/3/2016, the “*plaintiff/respondent*” did invade the said land parcel and started planting. He reported the invasion to Big Tree Police Post vide **OB No. 7/2/3/2016** and when police officers from the Post came to the suit land, they were overwhelmed. He also states that the plaintiff has started subdividing, contracting and planting crops on the suit land. That is the evidence presented before this court in support of the application.

7. The affidavit of one Peter Orwavu, a process server confirms that Francis Moyo Wafula the Chairman of the plaintiff was served with a copy of an order dated 17/3/2009 on 10/3/2016 at 8.50 am. On the same day Mr. Patrick Mumia Simiyu was served with a copy of the same order at 8.30 am. I do not find evidence of service of the treasurer, Justus Wanyama who is said to be the 3rd alleged contemnor. Photographs of what are said to be developments on the suit land effected by the plaintiff have been exhibited as **Exhibit “BOO4”** in the affidavit of Barry Odongo Okundi.

8. In a further supplementary supporting affidavit of Barry Odongo Okundi, filed on 30/6/2017 he states that the affidavit of Francis Wafula Nyongesa filed in the record, on 7/2/2017 in support of the plaintiff’s notice of motion dated 7/2/2017 amounts to an admission that the plaintiff is in willful breach of the orders made by this court on 17/12/2009. The said affidavit of Francis Wafula Nyongesa is exhibited in a bundle marked “**BOO1**”. The said affidavit addresses the issue of eviction of the plaintiff’s members from land claimed by the 1st defendants. This is the eviction that occurred on 27/1/2017.

9. The application that the quoted affidavit of Francis Wafula Nyongesa supports seeks to restrain the defendants in this suit from executing or further executing the orders of this court made on 17/12/2009 as read with the orders of this court made on 11/7/2016. This court ruled on that application for restraining orders vide a Ruling dated 6/3/2017. The application was dismissed. This court stated that “*if execution of the orders is being effected to ensure that the status quo as at the time of the orders made remains this court cannot interfere with the said process as to reverse the execution of its own orders as though this was an appeal*”.

10. It is clear from the supporting affidavit of Joseph Wafula Nyongesa attached to that application dated 7/2/2017 is evidence that he was aware of the orders made by this court on 17/12/2009 and orders by this court on 11/7/2017. He is the one in a position of responsibility, sufficiently positioned to advise members of the plaintiff to cease any actions on the suit land comprising of 250 acres which may be contrary to the import of the orders made by this court on 17/12/2009 and on 11/7/2016.

11. The reply of Francis Wafula Nyongesa to the instant application is in the form of an affidavit sworn by himself on 17/10/2017 and a supplementary affidavit also sworn by himself on 18/10/2017. In those affidavits he acknowledges that he holds the position of Chairman of the plaintiff. He avers that the instant application offends the provisions of **Order 40 Rule 6 of the Civil Procedure Rules**; that the affidavit of Barry Okundi is defective for want of disclosure as to whether he has authority to swear on behalf of the 1st defendant; that the orders of 17th December, 2009 are not executable as they offend the provisions of **Order 40 Rule 6 of the Civil Procedure Rules**; that the application cannot stand the test of the **Section 34 of the Contempt of Court Act No. 46 of 2016**, that the orders sought to be executed are not valid; that the orders have never been served upon him; that Mr. Patrick Simiyu and Justus Wanyama

were also never served; that the affidavits of Stephen Kariuki Njoroge and Joseph Elila in support of the instant application are defective and should be expunged, that the plaintiff has been in the suit land since 1989 to date and without this matter being heard and finally disposed of on its merits and clear demarcation of boundaries by the surveyors, it will not be clear as to who owns what land; that the orders of court did not disclose the LR Number yet there more than one LR Number; and that the plaintiff has paid up Kshs.9,000,000/= demanded by the 2nd defendant and by 2008, the plaintiff was in occupation of the whole land that is comprised in LR No. 7060/2 and that there is evidence to prove their occupation of the land since 1989.

12. The court has looked at the record and seen that despite the averments of lengthy occupation of the suit land by the plaintiff's Chairman, there is evidence in the Ruling of the court dated 11/7/2016 that that is not true. At **paragraph 8** of that Ruling the court stated as follows:-

“8. It is important to note that the plaintiff/ respondent's claim is based on 600 acres which it contends that it bought from the Agricultural Finance Corporation (AFC). The defendant /applicant also contends that it purchased 250 acres out of the 600 acres. Before the orders of maintenance of status quo were given on 17/12/2009 the executive officer of the court was sent to the ground. He brought a report which informed the order which was given on 17/12/2009 and issued on 13/1/2010. The report clearly stated that the 250 acres were occupied by the defendant applicant.”

13. This court has therefore established the fact that the plaintiff was not in occupation of the 250 acres as at 17/12/2009. The allegations by the plaintiff Chairman are therefore false. If the Chairman is the one relied on to lead the members, he must have either orally or by his conduct disseminated this his idea of the alleged invalidity of this court's orders dated 17/1/2009 to the members of the plaintiff hence the invasion being complained of by the 1st defendant, which the plaintiff's Chairman has attempted to support and defend by way of his affidavits sworn on 7/2/2017, 17/10/2017 and 18/10/2017 which are all in the court record.

14. I also find that the **Contempt of Court Act (No 46 of 2016)** commenced on the **13th January 2017** after the matters complained of in the application and after the instant application was filed and there is no submission by the respondents that it has retrospective application of its provisions.

15. A court order should be obeyed at all times unless and until it has been set aside notwithstanding claims of its invalidity. Any conduct contrary to the contents of the court order is capable of being deemed as contempt of court if it is established that the alleged contemnor was either served with the order or had knowledge of the order. It matters not that the alleged contemnor believes the order to be invalid or irregular. His responsibility should have be to obey the court order until he has had it set aside.

16. Only the Chairman of the plaintiff has filed replying affidavits and those affidavits affirm first that he had knowledge of the orders of this court made on 12/7/2009 and that secondly, for his own reasons and beliefs he was ready to disobey the said orders. It is possible that members of groups of people who comprise co-operative societies like the 1st respondent are likely to follow the example set by their Chairman who they look up to for guidance in matters of land, which are possibly the only bonding factor between members in the society. The application for orders made against the said chairman, Francis Wafula Nyongesa, has merits. This court finds him to be in contempt of court in that he has disobeyed, and willfully so, the orders of this court issued on 12/7/2009 and for that reason I convict him of the offence of contempt of court and order him to personally appear in this court on **30th January 2018** for sentencing.

17. As for the other alleged contemnors, I find no evidence that contempt of the court orders of 12/7/2009 has been proved against them. The prayers against them are dismissed with no orders as to costs. The Chairman of the plaintiff, Francis Wafula Nyongesa shall personally pay the costs of this application.

Dated, signed and delivered at Kitale on this **16th** day of **January, 2018**.

MWANGI NJOROGI

JUDGE

16/01/2018

Coram - Before Mwangi Njoroge Judge

Court Assistant - Picoty

Mr. Ambutsi for Applicant

Mr. Khaosa holding brief for Mokuu for the Respondents

COURT

Ruling read in open court in the presence of Counsel for the parties.

MWANGI NJOROGI

JUDGE

16/01/2018