



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU

E.L.C. CASE NO. 224 OF 2014

FORMERLY KERUGOYA ELC 820 OF 2014

MERCY NJERI NYAGA.....1ST DEFENDANT

SAMWEL MUNYI NYAGA.....2ND PLAINTIFF

(Suing as Legal Representatives of the Estate of Nyaga Munyi.....(DECEASED)

VERSUS

ERASTUS NJUE GITANGUTHI.....DEFENDANT

JUSTUS GATUMUTA.....DEFENDANT

THE PRESBYTERIAN FOUNDATION.....DEFENDANT

RULING

1. On 13th July 2017 the court granted the following orders against the Defendants following the Plaintiffs' application dated 6th December 2016;

a. A temporary injunction be and is hereby granted restraining the Defendants/Respondents by themselves, their agents, servants or workers from destroying, damaging or felling the trees and coffee bushes on the suit land namely Ngandori/Kiriari/3208/3209 and 3210 until this suit is heard and determined.

b. Costs of the application shall be in the cause.

2. On 25th September 2017, the Plaintiffs filed a notice of motion dated 20th September 2017 under Order 40 Rule 3 (1) (3) and 4 of the Civil Procedure Rules seeking the following orders.

a. The Respondents herein be cited for disobedience and contempt of the injunction order issued on 13th July 2017.

b. Costs be provided for.

3. The said application was based upon the grounds stated on the face thereof and supported by an affidavit sworn by the 1st Plaintiff on 20th September 2017. It was contended that the Defendants had disobeyed the order of temporary injunction issued on 13th July 2017. It was stated in the supporting affidavit that the Defendants had continued with further destruction on the suit properties and erection of new buildings.

4. The Plaintiffs exhibited some photographs which indicated some construction going on and some workmen at work. There is no indication in the photos of any trees or coffee bushes having been felled or destroyed.

5. The Defendants filed grounds of opposition to the said application dated 12th October 2017 stating as follows;

a. That the terms of the orders have not been disobeyed or breached.

b. That the 1st and 2nd Defendants/Respondents are only members of the congregation and not directors or commissioners of the 3rd

Defendants.

c. That the application is misdirected.

6. When the parties appeared before me on 16th November 2017 for hearing of the said application, it was agreed that the said application be disposed of through written submissions. The Plaintiffs were to file and serve theirs within 30 days whereas the Defendants were to file and serve theirs within 21 days of service. The record indicates that the Plaintiffs filed their submissions on 28th December 2017 but there is no indication of the Defendants having filed theirs by the time of preparation of the ruling.

7. For the Plaintiffs to succeed in their quest to punish the Defendants for contempt of court, they must demonstrate the following elements;

a. That there was a court order duly issued by a court of law whose terms were unambiguous.

b. The said order was duly served together with a notice of penal consequences.

c. There was violation or breach of the order.

8. There is no doubt in this case that the court granted a temporary order of injunction against the Defendants on 13th July 2017. In fact, the existence of the order is not denied by the Defendants. What they are disputing is the alleged breach.

9. The second aspect relates to service of the order and notice of penal consequences. The aspect of service is not disputed by the Defendants. The court has noted from the record that the Defendants' advocate was represented in court when the order was granted on 13th July 2017.

10. The only aspect which requires consideration is service of notice of penal consequences. It is generally accepted that a person is not liable to be punished for contempt of court unless the relevant order together with a notice of penal consequences was served. The copy of the extracted order of 13th July 2017 does not bear an endorsement of a notice of penal consequences at all.

11. As was stated in the case of *Ochino & Another Vs Okombo & 4 Others [1989] KLR 165;*

“As we read the law, the effect of the English provisions is that as a general rule, no order of court requiring a person to do or abstain from doing any act may be enforced (by committing him for contempt) unless a copy of the order has been served personally on the person required to do or abstain from doing the act in question. The copy of the order must be indorsed with a notice informing the person on whom the copy is served that if he disobeys the order, he is liable to the process of execution to compel him to obey it.”

12. The third element relates to breach or violation of the court order. The court has carefully considered the order made on 13th July 2017. It restrained the Defendants only from destroying or felling trees and coffee bushes on the suit properties. They were not restrained from undertaking any form of construction on the suit properties. The Plaintiff had not asked for such an order.

13. In my view, the terms and boundaries of the order of temporary injunction made on 13th July 2017 were sufficiently clear. There was no room for their expansion. The Plaintiffs argued in paragraph 5 of their supporting affidavit that the orders “vicariously and implicitly forbid further construction of any structure.” In my opinion, the orders of 13th July 2017 did not stop the Defendants from undertaking or proceeding with any construction. In fact, the term “construction” did not appear in the order.

14. In the said case of *Ochino & Another Vs Okombo & 4 Others*, (supra) the Court of Appeal quoted the following passage from the case of *Mwangi Mangondu Vs Nairobi City Commission, Civil Appeal No 95 of 1998;*

“This requirement is important because the court will only punish as a contempt a breach of injunction if satisfied that the terms of the injunction are clear and unambiguous, that the Defendant had proper notice of the terms and that breach of the injunction has been proved beyond reasonable doubt.”

15. The court is, therefore, far from satisfied that the Defendants have violated the terms of the order of injunction made on 13th July 2017. That order did not require them to stop any construction. It only restrained them from destroying and felling trees and coffee bushes. As indicated earlier, the Plaintiffs have not demonstrated destruction of trees and coffee bushes.

16. The upshot of the foregoing is that the court finds no merit in the Plaintiffs' notice of motion dated 20th September 2017 and the same is hereby dismissed with costs.

17. It is so decided.

RULING DATED, SIGNED and DELIVERED in open court at EMBU this 5th day of APRIL, 2018

In the presence of 1st and 2nd Plaintiffs in person and Mr Andande holding brief for Ms Beth Ndorongo for the Defendants.

Court clerk Muinde.

Y.M. ANGIMA

JUDGE

05.04.18