



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

ENVIRONMENT AND LAND CASE NO. 303 OF 2016

JOSEPH CHEPUENDO KOSAITA..... PLAINTIFF

VERSUS

NICHOLAS KIPKURUI NGENO.....DEFENDANT

RULING

1. By Notice of Motion dated 17th May 2017, the plaintiff seeks the following Orders:

1. Spent.

2. That this honourable court be pleased to find that the Respondent, Nicholas Kipkurui Ng'eno is in contempt of orders given and or issued by this honourable court on the 30th day of January 2017 and the 27th day of February 2017 respectively and the subsequent Order of the 13th day of April 2017.

3. That the respondent herein Nicholas Kipkurui Ng'eno be committed to civil jail for a period of not less than six months and or his property be attached as punishment for the said contempt.

4. That costs of this application be borne by the Respondent.

2. That application is supported by an affidavit sworn by the plaintiff. It is deposed in the affidavit that on 1st February 2017 the defendant was served with the order of this court which was made on 26th January 2017. That despite such service, the defendant disobeyed the order from 2nd March 2017 by continuing to trespass on the suit property and farming on it. It is further stated that the defendant has also moved his wife onto the suit property.

3. The application is opposed by the defendant through his replying affidavit sworn on 22nd November 2017. The defendant denies ever being served with the order of the court. He contends that the said orders are eviction orders disguised as injunctive orders. He further states that he has been in occupation of the disputed portion of land for over three years.

4. The application was argued by way of written submissions. The applicant's submissions were filed on 7th December 2017 while the respondents' submissions were filed on 6th December 2017. I have carefully considered the application, the affidavits filed as well as the submissions. An allegation of contempt of court is a serious matter. There is always the risk that the property or liberty of the alleged contemnor may be lost. The court must therefore approach the matter with circumspection. That said, the duty to obey court orders is clear beyond discussion. In **Refrigeration and Kitchen Utensils Ltd v Gulabchand Popatlal Shah & Another** Civil Application No.39 of 1990, the court stated:

“A party who knows of an order, whether null or valid, regular or irregular, cannot be permitted to disobey it... It would be most dangerous to hold that the suitors, or their solicitors, could themselves judge whether an order was null or valid-whether it was regular or irregular. That they should come to the court and not take upon themselves to determine such a question.....he should apply to the court that it might be discharged. As long as it exists it must not be disobeyed.”

5. The order that is said to have been disobeyed in this matter is in the following terms:

That, pending the hearing and final determination of this suit, this honourable court does hereby grant an interim injunctive order, directing upon the defendant by himself, his servants, agents and/or any other person acting under the defendant’s authority; restraining them from trespassing on and/or further trespassing on, occupying, cultivating, planting crops and/or in any other manner whatsoever interfering with the plaintiff’s rights of absolute ownership of the plaintiff’s parcel by measurement, five (5) acres or thereabouts (title not issued) situate at Koitara area, Mariashoni sub-location, Mariashoni location within Nakuru County.

6. The process server Manuel Sakayo Markey states in his affidavit of service in respect of the order that he served it upon the defendant at his “homestead situated on the suit piece of land”. Among other matters, the order restrained the defendant from “further trespassing on” and occupying the suit property. In view of what the process server stated in his affidavit of service as regards where he found the defendant, it appears that the defendant may in fact have been living on the suit property prior to the date of alleged service of the order. Considering that the order was issued by another judge, I am unable to determine if the intention was to grant an eviction order.

7. Ordinarily however, whenever the court intends to have a litigant evicted, the intention is always made abundantly clear in the order. A strict enforcement of the order herein may result in an eviction. That would not be a desirable outcome at this point of the litigation. At the same time, I am unable to find that the defendant moved into the suit property after being served in the face of the statement by the process server that he found him in his home which is within the suit property.

8. In view of all the foregoing, I am not persuaded that the plaintiff has made a case to warrant granting the orders sought in Notice of Motion dated 17th May 2017. The application is dismissed with costs to the defendant. Parties to expeditiously prepare the main suit for hearing.

Dated, signed and delivered in open court at Nakuru this 10th day of May 2018.

D. O. OHUNGO

JUDGE

In the presence of:

Ms. Wanuma holding brief for Mr. Olonyi for the plaintiff.

Mr. Kibet for the defendant.

Court Assistant: Gichaba