REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 120 OF 2017

PHILEMON SONGOK.....PLAINTIFF/APPLICANT

VERSUS

PAULINE KEBENEI ALIAS PAULINA JEBET ROTICH.....1ST DEFENDANT/RESPONDENT

KENNETH KIPKEMBOI.....2ND DEFENDANT/RESPONDENT

PHILIP CHERUIYOT.....3RD DEFENDANT/RESPONDENT

RULING

The plaintiff has come to court for orders that the defendants/respondents be committed to civil jail for such a period as would be deemed necessary and/or in the alternative be ordered to pay a fine as stipulated by section 29 of the Environment and Land Court Act, 2011 for being in contempt of court by blatantly and with impunity disobeying and breaching the orders issued on the 21st day of March, 2017 and that the respondents be ordered to purge their contempt before they can be given audience to canvass the application dated 21.3.2017 inter-parties.

The application is based on grounds that the trial court vides the application dated 21.3.2017 filed under certificate issued orders restraining the dealing of the disputed parcel of land by all the parties. That the said order was duly served upon the respondents on 22.3.2017 and it had a penal notice clearly stipulating the penalties for non-compliance.

That at the time the aforesaid orders were issued, the land in question had not been ploughed by the respondents which position was made known to court on 28.3.2017 when the application had been scheduled for inter-parties hearing. That the trial court on 28.3.2017 reiterated the above order which provided thus; “In the meantime, all the parties are hereby restrained from dealing with the suit parcel.”

That the respondents, their agents and/or servants with total impunity have disregarded, ignored, neglected and/or refused to comply with the aforesaid court order and instead chose to plough and plant the disputed portion on 28th March, 2017 in blatant disobedience of the court orders in force. The respondents are aware of the orders in force but are disobeying the same intentionally hence bringing the sanctity and dignity of this court to question/disrepute. The conduct of the respondents is deliberate and calculated at lowering the dignity, honour and sanctity of the court. The respondents, their agents and/or servants ought to be committed to civil jail and/or be fined for being in contempt of the court order as stipulated by law.

In the supporting affidavit, the plaintiff states that in 2007, he purchased land from the late Stephen Kipyego Kebenei and have been utilizing the same without any interruption from the defendants till January, 2017 when the defendants after the death of the said Stephen Kipyego Kebenei in December, 2016 stopped him from utilizing the same. That he then moved this honourable court seeking injunctive orders vide his application dated 21.3.2017 and that the trial court subsequently issued orders restraining the dealing of the disputed parcel of land by all the parties.

The said order was duly served upon the respondents on 22.3.2017 and it had a penal notice clearly stipulating the penalties for non-compliance. That to confirm that indeed service was effected, the firm of Limo R. K. & Company Advocates entered appearance on their behalf and that at the time of the aforesaid orders were issued, the land in question had not been ploughed by the respondents which position was made known to the court on 28.3.2017 when the application had been scheduled for inter-parties hearing.

The respondents, their agents and/or servants with total impunity have disregarded, ignored, neglected and/or refused to comply with the aforesaid court orders and instead chose to plough and plant the disputed portion on 16th May, 2017 in blatant disobedience of the court orders in force. The respondents are aware of the orders in force but are disobeying the same intentionally hence bringing the sanctity and dignity of this court to question/disrepute. The conduct of the respondents is deliberate and calculated at lowering the dignity, honour and sanctity of the court. The respondent, their servants and/or agents ought to be committed to civil jail and/or be fined for being in contempt of the court order as stipulated by law.

The respondent filed a replying affidavit stating that her counsel has explained to her the contents of the application dated 16th July, 2017 and the affidavit of service of PATRICK G. ONGERI dated 23rd March, 2017 and states that the said application and affidavit of service is full of falsehoods since neither the 2nd and 3rd respondents nor herself have ever been served with any court documents in these proceedings including the impugned order.

The alleged return of service does not disclose the person who directed the process server to her alleged homestead or the homesteads of the 2nd and 3rd respondents nor whether they were known to him previously. That she personally signs all her documents and at no time has she ever thump printed any document in her life time.

That she is informed by her advocate on record, which information she verily believes to be true and correct, that the alleged return of service dated 22nd September, 2016 by PATRICK G. ONGERI is defective in substance and form and does not meet the threshold required for service of court orders and that she is apprehensive that the respondent intended to ambush them with eviction orders and warrants of arrest as is the case herein in violation of their right to be heard.

They were therefore unaware of any orders and only became aware of these proceedings on 27th March, 2017 upon hearing from neighbours and the area assistant chief BARNABAS K. BIWOTT who works with the applicant who apparently is their chief, a position confirmed by her advocate upon perusing the cause list and filing a memorandum of appearance thereon on the date of hearing. That in December, 2016, she took possession of all that parcel of land known as L.R NO. NANDI/NDALAT/706 upon expiry of the plaintiff's lease and she has been thereon since then without any interruption.

According to the respondents, the photographs annexed to the said application do not emanate from the suitland since the maize thereto is at weeding stage whereas her maize plantation long flowered, tussled and developed cobs. They at a loss why this application has been brought more than four months since the impugned orders were issued. She is the biological mother of the 2nd and 3rd respondents and the farming activities on the suitland have been undertaken by herself to fend for her family and the 2nd and 3rd respondents have nothing whatsoever to do with it.

That the applicant is abusing court process and attempting to harass and intimidate them with a view of defeating the preliminary objection dated 28th March, 2017.

That she is informed by her advocate on record, which information she verily believes to be true and correct that the degree of proof required in contempt of court proceedings is higher in normal civil proceedings than being on a balance of probability. That the said degree of proof has not been achieved.

The plaintiff filed a supplementary affidavit annexing photo of the maize grown in the suit parcel contrary to court order. Moreover, the defendant has planted blue gum trees on the suit land. This allegation was denied by the defendants who reiterated that the photos were not emanating from the farm.

M/s Isiaho, learned counsel for the applicant submits that there were injunctive orders issued on 21.3.2017 restraining both parties from utilizing the suit land. The order was served upon the respondent and the respondent went further to plant.

Mr. Kibii, learned counsel for the respondent argues that when the order was issued exparte, the defendants were in actual and physical possession of the property. There was no personal service of the order upon the defendants. That the process server does not state how he identified the respondent. There was no water tight return of service. The respondent argues that at the time of obtaining the said orders, the respondent had already planted the maize.

I have considered the application, the replying affidavit and the rival submissions and do find that the plaintiff has demonstrated that this court on ***21.3.2017*** issued an order ***exparte*** that all the parties herein be restrained from planting on the suit parcel of land and scheduled the application for ***interparte*** hearing on the ***28th of March, 2017.*** On the scheduled date, the matter did not proceed and therefore the court adjourned it to the ***20th April, 2017*** and ***extended the interim orders*** to the said date in the presence of both counsel. Both parties were aware of the court order or ought to have been aware of the court orders as their counsel were in court. The land had not been tilled when the court made the orders. The photo dated 15th March 2017 shows that the land had not been tilled on that date. The photo dated 16th May 2017 shows that the land had been tilled and not planted and the photo dated 25th of June 2017 shows that the land had been planted with maize crop. The respondent has not availed to this court any photo to the contrary but her defence has been that the photos do not emanate from the suit land.

The further photos of 31.07.2017 at 12.55 p.m., 12.58 p.m., 12.54 pm and 12.57 pm show that the maize was not even knee high and therefore could not have been planted in January, 2017 as claimed by the defendant. In fact, the photo shows that the defendant had planted trees in the suit land. Planting eucalyptus trees in the suit land was a further count of disobedience.

I do find that the defendant was aware of the court order but chose to ignore the same by planting maize and trees. It is sufficient for the applicant to prove that the alleged contemnor was aware of the court order.

In the court of Appeal decision of **Justus Kariuki Mate & Another Vs Martin Nyaga Wambora & Another (CA 24/2014) Nyeri,** the CA per Visram, Koome and Odek JJA held that personal service of the order alleged to have been disobeyed is not mandatory. The court stated:

> ***"On the other hand, however, this court has slowly and gradually moved from the position that service of the order along with the Penal Notice must be personally served on a person before contempt can be proved. This is in line with the dispensations covered under Rule 81:8 (1) (Supra)."***

The Court of Appeal in the case of **Shimmers Plaza Ltd Vs NBK (2015) eKLR Karanja, Mwera, Mwilu JJA also** approved the growing jurisprudence right from the High Court that has reiterated that knowledge of a court order suffices to prove service and dispenses with personal service for the purposes of contempt proceedings. The Court of Appeal in the above Shimmers Plaza case cited with approval Hon **Lenaola J in Basil Criticos Vs Attorney General & 8 Others (2012) eKLR,** where the learned Judge pronounced himself thus: -

> ***"…. the law has changed and as it stands today knowledge supersedes, personal service…. where a party clearly acts and shows that he had knowledge of a court order, the strict requirement that personal service must be proved is rendered unnecessary."***

The CA in **Shimmers Plaza Ltd** also affirmed the position in the **Martin Wambora case** and emphasized that.

> ***"It is important however, that the court satisfies itself beyond any shadow of a doubt that the person alleged to be in contempt committed the act complained of with full knowledge or notice of the existence of the order of the court forbidding it. The threshold is quite high as it involves possible deprivation of a person's liberty.***

This standard has not changed since the old celebrated case of **EXPARTE LANGELY 1879, 13 Ch D/10 (CA)** where Thesiger L. J stated at P. 119 as follows:-

> ***"…. the question in each case, and depending upon the particular circumstances of each case, must be, was there or was there not such a notice given to the person who is charged with contempt of court that you can infer from the facts that he had notice in fact of the order which has been made? And, in a matter of this kind, bearing in mind that the liberty of the subject is to be affected, I think that those who assert that there was such a notice ought to prove it beyond reasonable doubt."***

This court poses a further question - What then amounts to "notice"?

Black's Law Dictionary 9th **Edition** defines notice as: -

> ***"A person has notice of a fact or condition if that person has actual knowledge of it has received information about it, has reason to know about it, knows about a related fact; is considered as having been able to ascertain it by checking an official filing or recording."***

The court in the **Shimmers Plaza Ltd case** found that knowledge of the judgment or order by the advocate of the alleged contemnor sufficed it for contempt proceedings, particularly where the advocate was in court representing his client (alleged contemnor and the orders were made in his presence.).

The same issue of knowledge was also canvassed by the Canadian Supreme Court in the case of **Bhatnager Vs Canada (Minister of Employment and Immigration (1990) 2 S C R 217 Per L.J. Sopinka** who held: -

> ***"On the cases, there can be no doubt that the common law has always required personal service or actual personal knowledge of a court order as a pre-condition to liability in contempt. Knowledge is in most cases (including Criminal cases proved circumstantially and in contempt cases inference of knowledge will always be available where facts capable of supporting the inference are proved (see Avery Vs Andrews (1882) 51 L J Ch 414).***

The above case was also cited with approval by the CA in Shimmers Plaza Ltd case

I do find that respondents were in breach of the court order knowingly and therefore I do order that each defendant/ respondent to serves a jail term of 1 month, in the alternative, all the defendants to pay a consolidated fine of Kshs.100,000. Orders accordingly.

Dated and delivered at Eldoret this 19th day of June, 2018.

A. OMBWAYO

JUDGE