



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC APPEAL NO. 4 OF 2017

KILONZO WAMBUA.....1ST APPELLANT

NICHOLAS MAUNDU.....2ND APPELLANT

VERSUS

MOSOI P. PARKUT.....RESPONDENT

RULING

What is before Court for determination is the Appellants' Notice of Motion application dated the 15th March, 2017 brought pursuant to Section 5 of the Judicature Act, Order 52 rule 2 (2) of the Rules of the Supreme Court of England, Sections 1, 1A, 1B, 3 and 3A of the Civil Procedure Act, Order 40 rule 4 of the Civil Procedure Rules and all the other enabling provisions of the law. The Appellants seek the following orders:

1. Spent
2. That the Respondent MOSOI PARKUT be committed to prison for 6 months for contempt of the Court Orders recorded by consent on 17th March, 2016.
3. That the Respondent be condemned to pay the costs of this application.

The application is premised on the grounds which in summary is that the Respondent has blatantly and flagrantly refused as well as failed to comply with the Consent Orders made on 17th March, 2016 which granted injunctive relief against the Respondent including his agents, agents, or employees from interfering with the Appellants' quiet possession, occupation as well as enjoyment of the 16 acres portion of land comprised in land parcel number Kajiado/ Kaputiei Central/ 677. Despite personal service of the said Order, the Respondent has started carrying out soil harvesting and blocking Appellants from accessing all the land, proceeded to threaten, harass and torment the Appellants including trespassing on their portion. The Appellants have no other way of enforcing the Court Order. Further the dignity of the Court is at stake and it is of paramount importance if the Respondent was cited for contempt.

The Application is supported by the affidavit of KILONZO WAMBUA the 1st Appellant herein who avers that despite personally serving the extracted Court Order upon the Respondent, he has started carry out soil harvesting including blocking the Appellants from accessing the suit land and commenced threatening, harassing, trespassing as well as encroaching on the suit land. He contends that the Respondent has been adamant in his acts despite numerous follow ups both formally as well as informally. He reiterates that the matter has caused them mental anguish and torture and it is important if the Respondent is punished for contempt.

The Respondent MOSOI P. PARKUT opposed the application and filed a replying affidavit where he deposed that the Appeal herein emanated from a lower court case number PMCC No. 282 of 2010 where the trial Magistrate granted a judgment in his favour despite the Appellants obtaining orders of injunction against him pending the outcome of the said suit. He contends that he always obeyed the Court Orders therein from the year 2010 upto 2016 when the matter was concluded. He claims Appellants lodged the instant appeal together with a Notice of Motion Application dated the 21st January, 2016 seeking a stay of execution including injunctive orders against their eviction or interference or quiet possession as well as occupation of the subject sixteen (16) acres comprised in his land parcel number Kajiado/ Kaputiei Central/ 677. He confirms that on 17th March, 2016, he consented to a stay of execution as well as injunctive orders against the Appellant's eviction from the sixteen (16) acres comprised in his land parcel number Kajiado/ Kaputiei Central/ 677, pending the outcome of the Appeal. He denies willfully disobeying the Court Order by carrying out harvesting any soil from the said sixteen (16) acres nor tormenting the Appellant, by interfering with his quiet possession including occupation of the said land. He insists the alleged claims of contempt against him are too wild as well as wide in nature and unspecified in respect to the date and or times. He states that the said allegations are unsubstantiated and only aimed at casting him in very negative light including to portray him as belligerent and contemptuous to the Court. He reiterates that the claims for contempt are meant to divert the court's attention from expeditiously hearing and determining the Appellants' Appeal and avers that it behoves the Applicant to prove the allegations levelled against him by way of cogent evidence.

The Appellant and the Respondent filed their respective submissions that I have considered.

Analysis and Determination

Upon considering the Notice of Motion dated the 15th March, 2017 including the respective affidavits and submissions from the parties, the only issue for determination is whether the Respondent is in contempt of the Court Order granted on 17th March, 2016.

It is not in dispute that the Court Order made on 17th March, 2016 was entered into by consent, which Order granted injunctive relief against the Respondent including his agents, agents, or employees from interfering with the Appellants' quiet possession, occupation as well as enjoyment of the sixteen (16) acres portion of land comprised in land parcel number Kajiado/ Kaputiei Central/ 677. It is also not in dispute that the Respondent was well aware of the said Court Order and that he was personally served with it.

What is in dispute is the Appellants' allegations that the Respondent is interfering with their peaceful occupation of the sixteen (16) portion of the suit land. The Respondent denies these allegations and contends that the Appellants have failed to indicate the exact period he has been in contempt of said Court Order.

The legal provisions governing contempt of court are highlighted here below;

Section 27(b) of the Contempt of Court Act provides that **'a person who willfully and without lawful excuse disobeys an order or directions of a superior or subordinate court in the course of the hearing of a proceeding;'**

Section 28(1) of the Contempt of Court Act provides that **save as otherwise expressly provided in this Act or in any other written law, a person who is convicted of contempt of court is liable to a fine not exceeding two hundred thousand shillings or to imprisonment for a term not exceeding six months, or to both.'**

Section 29 (1) of the **Contempt of Court Act** provides that:

'Provided that nothing in this subsection shall render any such person liable to punishment if the person proves to the satisfaction of the court that the contempt was committed without his or her knowledge or that he or she exercised all due diligence to prevent its commission.'

In the case of **Maisha Nishike Ltd vs. Commissioner of Lands & 3 others (2011) eKLR** the court while citing the holding in **Kalyasoi Farmers Cooperative Society & others Vs County Council of Narok** the court held that: **'It is the plain and unqualified obligation of every person against, or in respect of, whom an order is made by a Court of competent jurisdiction to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void.'**

Further in the case of **North Tetu Farmers Co. Ltd v. Joseph Nderitu Wanjohi (2016) eKLR** Justice Mativo provided the four elements to be proved to make the case for civil contempt and stated as follows: **'The applicant must prove to the required standard (in civil contempt cases which is higher than civil cases - (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.'**

In the current scenario, I note that that the Appellants allege the Respondent has committed acts of contempt but do not indicate the period within which the said acts occurred. The Appellants provided some pictures of the suit land showing excavation thereon, but this cannot be conclusive as to which portion of land the alleged acts of contempt occurred, since the suit land is expansive. I note that Contempt proceedings are criminal in nature and the burden of proof is upon the Appellants to prove the same is ongoing. From the averments in the 1st Appellant's supporting affidavit, the Court is not able to decipher which portion of land the Respondent has interfered with.

It is against the foregoing and in the relying on the various judicial authorities cited above, including Section 29 of the Contempt of Court Act, I do not find the Respondent to be in contempt of the Court Order dated the 17th March, 2016 and will decline to allow the Notice of Motion application dated the 15th March, 2017. I will direct that the Appellants to set their Appeal down for hearing to enable the Court make a final determination of the matter herein.

Costs will be in the cause.

Dated, Signed and Delivered in Kajiado this 30th day of July, 2018

CHRISTINE OCHIENG

JUDGE