



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC APPEAL NO. 5 OF 2017

JOHN MUTHUSI MWEKE.....APPELLANT

VERSUS

MOSOI P. PARKUT.....RESPONDENT

RULING

What is before Court for determination is the Appellant's 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 15th 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 15th March, 2016 which granted injunctive orders against the Respondent including his agents, agents, or employees from interfering with the Appellants' quiet possession, occupation as well as enjoyment of the 38 acres portion of land comprised in land parcel number Kajiado/ Kaputiei Central/ 677. Despite personal service of the Order, the Respondent has started carrying out soil harvesting and blocking Appellant from accessing all the land, proceeded to threaten, harass and torment the Appellants including trespassing on their portion. The Appellant has no other way of enforcing the Court Order. 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 JOHN MUTHUSI MWEKE where he confirms that the extracted Order was served on the Respondent personally and in the presence of village elders. He contends that despite having made numerous follow up formally, informally, verbally and in writing, the Respondent has refused, failed, neglected and declined to comply. He avers that this matter has caused him great mental anguish and anxiety which has resulted in hardship as well as lack of access to including enjoyment of his land.

The Respondent MOSOI P. PARKUT opposed the application and filed a replying affidavit where he deposes that the application is misconceived, bad in law, an abuse of the court process, vexatious and ought to be dismissed with costs. He provides the chronology of the instant appeal as well as the application and indicates that the Appeal emanates from PMCC No. 323 of 2010 where an interlocutory injunction had been issued which order he did not disobey for six (6) years. He confirms that on 29th January, 2016 the trial court delivered judgment in his favour where the Appellant's suit was dismissed. He explains that the Appellant lodged the instant appeal together with a Notice of Motion Application dated the 5th February, 2016 seeking a stay of execution of the lower court order including an order of injunction against his eviction, interference or quiet possession as well as occupation of the subject 38 acres comprised in his land parcel number Kajiado/ Kaputiei Central/ 677 measuring 94.01 hectares. He confirms that on 15th March, 2016, he consented to a stay of execution of the lower court case judgment including an order of injunction against the Appellant's eviction from the subject 38 acres comprised in his land parcel number Kajiado/ Kaputiei Central/ 677, pending the outcome of the Appeal. He denies willfully disobeying the Court Order nor carrying out harvesting any soil from the subject 38 acres comprised in his land parcel number Kajiado/ Kaputiei Central/ 677. He further denies tormenting the Appellant, interfering with his quiet possession and occupation of the said land. He claims that the alleged claims of contempt against him are too wild as well as wide in nature and unspecified in respect to the date they occurred. Further, that the 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 Appellant's rather weak Appeal and getting the court to sympathize with him. He reaffirms that contempt proceedings being criminal in nature, it behoves the Applicant to prove the allegations levelled against him by way of cogent evidence but not wild and unsubstantiated allegations.

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

Analysis and Determination

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

It is not in dispute that the Court Order made on 15th March, 2016 was entered into, by consent, and it granted injunctive orders against the Respondent including his agents, agents, or employees from interfering with the Appellants' quiet possession, occupation as well as enjoyment of the 38 acres portion of land comprised in land parcel number Kajiado/ Kaputiei Central/ 677. It is further not in dispute that the Respondent was well aware of the Court Order having participated in the Consent. It is also not in dispute that the Respondent was served with the extracted Court Order.

What is in dispute is that the Respondent denies being in contempt of Court while the Appellant insists the Respondent is interfering with his peaceful occupation of the 38 acres from the suit land. The Respondent contends that the Appellant has not indicated the dates he was in contempt of Court Order.

The relevant legal provisions concerning the current scenario are highlighted herebelow:

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 **North Tetu Farmers Co. Ltd v. Joseph Nderitu Wanjohi (2016) eKLR** where Justice Mativo stated that: '**writing on proving the elements of civil contempt, learned authors of the book Contempt in Modern New Zealand have authoritatively stated as follows:-**

'there are essentially four elements that must be proved to make the case for civil contempt. 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 instant case, I note that that the Appellant alleges the Respondent has committed acts of contempt but does not indicate the dates nor the period which the act occurred. I note the Respondent still owns the suit land and was restrained from interfering with only a portion of it. Contempt proceedings are criminal in nature and the burden of proof is upon the Appellant to prove the same is ongoing. However, from the averments in the Appellant's affidavit, it is not clear, which portion of land the Respondent has interfered with. In the relying on the authorities above, and Section 29 of the Contempt of Court Act, I find that in the current circumstances and with the facts as presented, there is no evidence that the respondent is in contempt of the order of the court granted on 15th March 2016. In the circumstances, I decline to allow the Notice of Motion application dated the 15th March, 2017. I will further direct that the Appellant to set the Appeal down for hearing to enable the Court make a final determination of the said Appeal.

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

CHRISTINE OCHIENG

JUDGE