



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 46 OF 2018

IN THE MATTER OF ORDER 37 RULE 8, ORDER 40 RULE 1 & 2 AND ORDER 51 RULE 1 OF THE CIVIL PROCEDURE RULES, 2010

AND

IN THE MATTER OF SECTION 6, 9, 12 AND 14 OF THE MATRIMONIAL PROPERTY ACT, 2012

AND

IN THE MATTER OF SECTION 66, 93 & 107 OF THE LAND REGISTRATION ACT NO. 3 OF 2012

AND

IN THE MATTER OF SECTION 38 OF THE LIMITATION OF ACTIONS ACT, CAP 22, LAWF OF KENYA

AND

IN THE MATTER OF LAND PARCEL SOY/KIPSOMBA BLOCK [particulars withheld] (KIPSOMBA)/[particulars withheld]

BETWEEN

N C B.....PETITIONER/RESPONDENT

VERSUS

E K B.....1ST DEFENDANT/APPLICANT

A K B.....2ND DEFENDANT/APPLICANT

S K B.....3RD DEFENDANT/APPLICANT

RULING

On the 9.3.2018, this court issued a consent orders directing the plaintiff /respondent to utilize 50 acres and the 1st, 2nd and 3rd defendants to utilize 50 acres of all that property known as *Soi/Kipsomba Block [particulars withheld](Kipsomba)/13* measuring 100 acres pending the hearing and determination of the case.

The defendants/applicants filed the application dated 6.4.2018 claiming that the petitioner/respondent herein N C B be summoned to show cause as to why she should not be committed to civil jail for a term not exceeding six months for contempt of court having deliberately, willfully and persistently acted in defiant disobedience of the consent orders made by this Honourable court on 9th March, 2018.

That in the absence of any cause shown to the satisfaction of the court and the law, the respondent be fined Kshs.200,000 in addition to the incarceration in jail in accordance with section 28 of the contempt of Court Act No. 46 of 2016.

The defendant sought the order of the court that pending the hearing and determination of this application, the petitioner/respondent herein be ordered to demolish the fence she has put up on part of the 50 acres of all that property known as Soy/Kipsomba Block [particulars withheld] (Kipsomba)/ [particulars withheld] being utilized by the defendants/respondents herein and that the petitioner/respondent be ordered to immediately give the defendants/applicants vacant possession of their 50 acres share of all that property known as Soy/Kipsomba

Block [particulars withheld] (Kiplomba)/ [particulars withheld]. Moreover, that the defendants/applicants herein be allowed to continue ploughing their 50 acres share of all that property known as Soy/Kipsomba Block [particulars withheld] (Kipsomba)/ [particulars withheld].

The OCPD, Soy Police Station does provide security to the defendants/applicants on implementation of prayer No. 4, 5 and 6 above to ensure that the orders are effected.

That this Honourable court does issue such other directions and/or orders as the court may deem just and expedient to grant.

In the supporting affidavit, it is stated that the matter was reported at Soy Police Station and their statements were recorded.

The plaintiffs likewise filed an application citing the defendants for contempt claiming that the defendants have engaged in acts of contempt and undermining the authority of the court.

The plaintiff states in the supporting affidavit that on the 6.3.2018, the court made orders that the parties to utilize the land in dispute in equal shares pending the hearing of the application dated 28.2.2018. She has tried to talk to the defendant for a joint appointment of a surveyor but he has refused to co-operate. He tried to go through the area chief but it failed.

She managed to call a surveyor who showed her the area to fence. On 5.4.2018, she put up a fence on her small share. On 6.4.2018, the 2nd and 3rd defendants went and destroyed the fence using a tractor and a fight erupted between the plaintiff's son and the defendants' sons. She reported the matter to Soy Police Station and recorded a statement under O.B. No. 14/06/04/18.

On the 12.4.2018, the defendants brought surveyors on the land escorted by police officers. She was served with the orders dated 11.4.2018 and application dated 6.4.2018. She claims to have planted on land measuring 24 acres. The plaintiff claims that the defendants are guilty of disobedience of court order.

The plaintiff responded to the application dated 6.4.2018 by stating that the allegations made by the defendants that they were evicted with *pangas* and *rungus* are utter lies and that it is one way of tainting her name. She claims that she put up a fence after approaching the defendants several times for a Surveyor to demarcate each party's portion as ordered by the court. She has utilized only 20 acres and that she has not stopped the defendants from accessing their portion. She states that the defendants threatened to kill her and that is why she went to the police station. She admits that the parties herein fought in the land. She claims that she put up a fence but the defendants destroyed the same.

A K B, the 2nd defendant/respondent in reply to application dated 16.4.2018, states that he was not personally served with the court order issued on 9.3.2018 with regards to the consent order recorded on 6.3.2018 as alleged by the petitioner and was not personally in court on 6.3.2018. He is not aware that his advocate was personally served. He claims that they ploughed their share of the land and were in possession of the suit property. He claims that the defendants had ploughed 50 acres as admitted by the plaintiff whilst the plaintiff had not ploughed. It is claimed that she fenced off part of the property at night. She called for a surveyor without involving the defendants. S K B reiterates what A K B states.

I have considered the supporting affidavits in respect of the two applications and the replying affidavits and further affidavits and the affidavit of E K B and do find that there are allegations that the plaintiff accompanied by 4 (four) men armed with *rungus* and *pangas* evicted the 2nd and 3rd respondents and himself.

It is alleged that this happened on 5.3.2018 and yet the order was made on 6.3.2018. I want to believe that this was a typographical error. It is meant to be 5.4.2018. This allegation is denied by the plaintiff and therefore, the defendant should have adduced further evidence to prove that they were accosted by the four men including the plaintiff.

The defendants have not come out clearly that the part fenced by the plaintiff was their half-share of 50 acres. Moreover, the statements recorded before the Police Station have not been availed to this court. Both the plaintiff and the 1st defendant understood the import of the court order issued on the 6.3.2018 that they were supposed to share the property equally but went ahead to do their separate surveys and therefore, causing the violence that happened on the ground. It is admitted by both parties that each went differently with their surveyors and therefore violence ensued. The court order issued on 6.3.2018 required co-operation between the parties something that never happened.

According to Black's Law Dictionary 9th Edition, page 360:

"Contempt is a disregard of, disobedience to, the rules, or orders of a legislative or judicial body, or an interruption of its proceedings by disorderly behavior or insolent language, in its presence or so near thereto as to disturb the proceedings or to impair the respect due to such a body."

In Halsbury's Laws of England, it is stated: -

"It was the plain and unqualified obligation of every person against or in respect of whom an order was made by a court of competent jurisdiction to obey it unless and until it was discharged and disobedience of such an order would as a general rule result in the person disobeying it being in contempt and punishable by committal or attachmentan application to court by him not being entertained until he had purged his contempt"

Coercive orders made by the courts should be obeyed and undertakings formally given to the courts should be honoured unless and until they are set aside.

In Econet Wireless Kenya Ltd vs Minister for Information & Communication of Kenya & Another {2005} 1KLR 828 Ibrahim J (as he then was) stated as follows: -

"It is essential for the maintenance of the Rule of Law and order that the authority and the dignity of our Courts are upheld at all times. The Court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors. It is the plain and unqualified obligation of every person against or in respect of whom, an order is made by 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 void."

Contempt proceedings are *quasi-criminal* in nature and since the liberty of a person is at stake, the standard of proof is higher than in civil cases. This principle was reiterated in the case of **Gatharia K. Mutikika vs Baharini Farm Ltd {1985} KLR 227** where it was held as follows: -

"The Courts take the view that where the liberty of the subject is, or might be involved, the breach for which the alleged contemnor is cited must be precisely defined. A contempt of court is an offence of a criminal character. A man may be sent to prison. It must be satisfactorily proved... I must be higher than proof on a balance of probabilities, almost, but not exactly, beyond reasonable doubt. The standard of proof beyond reasonable doubt ought to be left where it belongs, to wit, in criminal cases. It is not safe to extend it to offence, which can be said to be quasi-criminal in nature. However, the guilt has to be proved with such strictness of proof as is consistent with the gravity of the charge... Recourse ought not be had to process of contempt of court in aid of a civil remedy where there is any other method of doing justice. The jurisdiction of committing for contempt being practically arbitrary and unlimited, should be most jealously and carefully watched and exercised with the greatest reluctance and the greatest anxiety on the part of judges to see whether there is no other mode which is not open to the objection of arbitrariness, and which can be brought to bear upon the subject. A judge must be careful to see that the cause cannot be mode of dealing with persons brought before him. Necessary though the jurisdiction may be, it is necessary only in the sense in which extreme measures are sometimes necessary to preserve men's rights, that is, if no other pertinent remedy can be found... Applying the test that the standard of proof should be consistent with the gravity of the alleged contempt..... it is competent for the court where a contempt is threatened or has been committed, and on an application to commit, to take the lenient course of granting an injunction instead of making an order for committal or sequestration, whether the offender is a party to the proceedings or not."

In Peter K. Yego & Others vs Pauline Nekesa Kode Nakuru HCCC No No. 194 of 2004 the court recognizing that contempt of court is criminal, held that it must be proved that one has actually disobeyed the court order before one is cited for contempt. The applicant in an application for contempt must prove beyond peradventure that the respondent is guilty of contempt.

In order to succeed in civil contempt proceedings, the applicant has to prove

- (i) the terms of the order.
- (ii) Knowledge of these terms.
- (iii) Failure to comply with the terms of the order.

I do find both the plaintiff and the 1st defendant were aware of the court order but willful chose to disobey the same by fighting on the ground and therefore are in contempt of court. I do order that each to pay a fine of Kshs. 50,000 within the next 10 days, failure of which each to serve a jail term of 30 days. Orders accordingly.

Dated, signed and delivered at Eldoret this 27th day of July, 2018.

A. OMBWAYO

JUDGE