



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA IN BUSIA**

**LAND & ENVIRONMENTAL DIVISION**

**MISC. APPL. NO. 31 OF 2016**

**CHRISTOPHER NG'ANG'A.....PLAINTIFF**

**VERSUS**

**ROSE AWINJA WAFULA.....DEFENDANT**

**RULING**

1. By an application filed as a Notice of Motion here on 16/2/2016, the Applicant - **CHRISTOPHER NG'ANG'A** - complained that the Respondent - **ROSE AWINJA WAFULA** - has violated a court order issued in Case No. PMCC 500/2002 by erecting a semi-permanent structure/kiosk along the common boundary that separates Plot No. 313/BUSIA MUNICIPALITY and Plot No. 312/BUSIA MUNICIPALITY. The Applicant owns Plot No. 313 while the Respondent owns Plot No. 312.

2. The application was brought under order 40 Rules 1, 3, Order 51 rule I of Civil Procedure Rules and High Court (organization and Administration) Act, 2015 and all other enabling provisions of law. The relevant prayers for consideration at this stage are as follows:

Prayer 2: That the Respondent herein be cited and/or punished for contempt of Court Order issued on 10/6/2010 by Busia Principal Magistrate vide Busia PMCC No. 500 of 2002.

Prayer 3: That the Respondent by herself, her servants, agents, assignees, employees and/or anyone else claiming under her be restrained by permanent injunction to remove the semi-permanent structure or kiosk erected on the common boundary to allow the Applicant access to the same.

Prayer 4: That this honourable court be pleased to issue an order restraining the Respondent from trespassing on the Applicant's plot 313/Busia Municipality.

Prayer 5: That costs of this application be provided for

3. The grounds advanced in support of the application indicate, *inter alia*, that Busia Principal Magistrate Court, vide PMCC 500/2002, ordered the Applicant, the Defendant in the case, to remove the man hole, wall and other structures along the common boundary between the two parties. The Applicant complied with the order but the Respondent went to the same boundary and erected a structure. By so doing, the Respondent is said to have blocked the Applicant's access to the back of his premises. According to the Applicant, the order applied to both parties.

4. The Respondent responded vide a replying affidavit filed on 8/6/2017. To her, the application is without merit. She said she was never served with any court order. She said further that leave of court needed to be served before filing this application and that the application should have been filed in the file that has the alleged violated order, not a different file.

5. The Respondent's reply prompted the Applicant to file a further affidavit on 31/1/2017. She annexed the lower court proceedings to that affidavit.

6. On 27/9/2017, it was agreed that the application be canvassed by way of written submissions. In that regard, the Applicant's submissions were filed on 1/11/2017. The Respondent filed her submissions on 15/11/2017.

7. The Applicant submitted, *inter alia*, that the parties herein had a case in the lower court - Busia PMCC No. 500/2002 - and the case concerned some features or structures put up by the Applicant on the common boundary. The court ordered the removal of the features and/or structures. The Applicant then removed them. In its judgement, the court is said to have observed that the features or structures were not only illegal but also a risk to both parties.

8. After the removal of the structures or features, the Respondent is said to have gone back to the same common boundary and constructed a kiosk. That construction is said to have blocked the Applicant's access to the backyard of his house. By doing this; the Respondent is said to have disobeyed the order issued by the court on 10/6/2010.

9. As regards the need for restraining order, the Applicant said that his rights to enjoy the common boundary has been infringed. According to the Applicant, his right of way along that boundary has been violated and the harm he suffers cannot be remedied by damages.

10. On his part, the Respondent submitted, *inter alia*, that the application herein is grossly incompetent. To the Respondent, the Applicant needed to show that an order was issued against him (Respondent); that he was served with such order; that the order had a penal notice; and that he had defied or disobeyed the order. The Respondent submitted that none of this was demonstrated. The order issued was said to be against the Applicant and was in fact in Respondent's favour. The Respondent wondered how he could be in contempt of an order issued in his favour.

11. Concerning the restraining order, the Respondent submitted that the application cannot attract an order of injunction. A substantive suit is required in order for injunction to issue.

12. I have considered the application, the response made, and the rival submissions. It appears clear that in the lower court matter, the Respondent herein was the Plaintiff and had sued two Defendants, the Applicant being the second, ultimately the order issued applied to the Defendants separately. It is necessary to set out the aspect of the order that applied to the 2<sup>nd</sup> Defendant, who is the Applicant here. The order was spelt out as follows:

**“2, The man holes and wall erected by the 2<sup>nd</sup> Defendant in the common boundary and which deny the Plaintiff access to the back of her house be removed by the 2<sup>nd</sup> Defendant and in default the Plaintiff be at liberty to remove at the expense of the 2<sup>nd</sup> Defendant.”**

It is important to note that the order as formulated only binds the 2<sup>nd</sup> Defendant, who is Applicant here. It does not bind the Respondent, who was Plaintiff in the lower court. Crucial too is the fact that the order as extracted and as annexed to the application herein, does not bind the Respondent at all. It only binds the parties who were Defendants in the case. The Respondent was not a Defendant; she was the Plaintiff.

13. A pertinent question to ask is: How can the Respondent be in contempt of an order that did not bind her? This is the same issue raised by the Respondent in her submissions. The fact of the matter is that the Applicant missed the point when he espouses the position that the order applied to the Respondent as well. That is clearly not borne out by the extracted decree annexed to the application by the Applicant himself. The Applicant is indulging in wishful thinking, and is obviously in error, by taking the position that the order applied to the Respondent.

14. No contempt therefore is demonstrated in this application.

15. I now turn to the issue of restraining orders. The application as filed is styled as coming under order 40 of Civil Procedure Rules. Order 40 ordinarily applies where a suit is pending. It is for interlocutory orders. Question is: Which suit is pending in this matter? The answer obviously is none. Besides, there seems to be a problem with the formulation of the order as asked for. The order is stated to be a permanent injunction “to restrain” the Respondent, her servants, assignees, employees, or anyone else claiming under her “to remove the semi-permanent structure or kiosk erected on the common boundary...” Restrained to remove? Restraining implies stopping, preventing or controlling some action or activity. This is the meaning one would find in an ordinary English dictionary. It is for instance the meaning I find in the Concise Oxford English Dictionary (Luxury edition) that I have with me. So what did the Applicant mean by restrained to remove? Is it prevented to remove, stopped to remove, controlled to remove or what?

16. Methinks that the Applicant probably meant compelled to remove or ordered to remove or enjoined to remove. But I cannot put words in the Applicant's mouth. The requirement of the law is that the order sought should be clear and/or unambiguous. The Applicant's prayer suffers this problem. And the court's further view is that if the Applicant's aim is to remove the structure allegedly put on the common boundary by the Respondent, what he should have been asked for is a mandatory injunction, not a permanent injunction sought as a restraining order. It is a mandatory injunction that compels action.

17. I need also to say something concerning the application as a whole. The application is one for contempt and also one for restraining orders. By its very nature, the application for contempt requires proof higher than on a balance of probabilities. Restraining orders on the other hand require proof on a balance of probabilities. When you mix these two in the same application and then file the same submissions for both as done here, how is one then going to distinguish between these two standards of proof? It appears to me that these orders should be applied for separately and if, for some reason, they have to be combined, then the submissions or arguments ensuing should clearly show the distinction between these two standards of proof. That is not the case here.

18. Finally, a question was raised by the Respondent as to why this application could not be filed in the very matter in which the order was made. I think I agree with the Respondent. The application should have been filed in that matter, not in a separate file. And if, possibly for reasons of jurisdiction, the application could not be filed in the lower court, was it not possible to transfer the lower court matter here and make the application?

19. When all this is considered, one would be excused for agreeing with the Respondent that there is mischief or incompetence in the way the matter was handled.

20. The upshot, in light of all the foregoing, is that the application herein is one for dismissal and I hereby dismiss it with costs.

**Dated, signed and delivered at Busia this 24<sup>th</sup> day of July, 2018.**

**A. K. KANIARU**

**JUDGE**

**In the Presence of:**

Plaintiff: .....

Defendant: .....

Counsel of Plaintiff: .....

Counsel of Defendant: .....