



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITALE

LAND CASE NO. 65 OF 2015

JULIUS KING'ORI KIMBUI.....PLAINTIFF

VERSUS

JASON KIAMBA KIMBUI.....DEFENDANT

R U L I N G

1. By an application dated **10th May, 2018** the plaintiff sought an order that the following three people namely **Daniel Mutai, Douglas Kimbui** and **Peter Mose Tirikoi** whose names appear on the Order of this court dated **31/1/2018** and extended on **15/2/2018** be committed to civil jail for a period of six (6) months willfully disobeying the above orders of **31/1/2018**. It also sought that pending the hearing and determination of this application inter partes, the people named hereinabove do purge contempt by not cultivating and/or harvesting the main crop planted while a court order restraining them from planting was in force.

2. The grounds relied upon are that on the **15th February, 2018** this honourable court extended the interim orders of **31/1/2018** restraining **Daniel Mutai, Douglas Kimbui** and **Peter Mose Tirikoi** from further wasting the suit land making bricks, destroying trees, putting up structures, ploughing and planting on the suit land; that on the **13th March, 2018** this honourable court ordered that the suit property should not be interfered with by any person whether a beneficiary or a stranger for the purpose of exploiting resources; that in spite of the fact that service of the court's orders restraining the people named on them were served upon them, they have ploughed the suit land and planted the maize crops on it yet they have not filed any application in court asserting their claim.

3. Opposing the application, the defendant through **Douglas Kimbui** filed replying affidavit dated **24/7/2018** on the same date. He avers the defendant is his father who met his demise on the **11th June, 2017**, that the suit seeks to evict the defendant who has been in occupation of the land since **1988**; that the counterclaim on the record claims that the plaintiff holds the suit land in trust for the defendant; that Peter Tirikoi is his father's employee and now inherited by the estate; that though he has been in occupation of the land he has never cultivated it; that he is not the administrator of the estate; that he was never served with the application dated **30/1/2018** or the orders of **30/1/2018**; that in any event the order was to remain in force up to **15/2/2018**; that the order is said to have been served not on him but on his manager by the name of Francis Gichumi whereas there is no such manager in his employ and that the order of **13/3/2018** never prohibited cultivation but exploitation of resources by extraction, committing of acts of waste, or substantially altering the nature of the land until further orders. He states that he has not disobeyed any order and in any event there was no order issued on the **31st January 2018**.

4. I must first examine the order alleged to have been disobeyed. On **31/1/2018** the court stated that the interim injunction of the nature sought in **prayer No. 2** of the application dated **30/1/2018** was granted pending the hearing of the application inter partes on **15/2/2018**. That prayer seeks the prohibition of digging the soil for making bricks, destroying the trees, putting up permanent structures, ploughing and planting on the suit land and from using the suit land in any manner. It is a broad order.

5. It is not true as stated by the respondent that the order did not prohibit cultivation. The main consideration of the court in granting the order was the absence of any administrator of the deceased who could be held accountable, hence the respondents themselves as perpetrators could be held accountable. The effect was that the order was to maintain the *status quo* of the land.

6. However, service remains the issue in this application. It has been admitted that service was effected on a person other than the respondents. The respondents had not been made parties in the suit hence proper service was important. Can they be said to have been served with the order? Daniel Mutai was said to have been served personally. Douglas Kimbui and Peter Tirikoi were not personally served. There is no indication that the orders served on Daniel Mutai reached the other two respondents.

7. I have examined the decision cited by the **2nd** respondent on the issue of personal service that is, **Sam Nyamweya & 3 Others Vs Kenya Premier League Ltd & 2 others 1989 eKLR**. In my view there should have been more material in the affidavit of service to demonstrate that all the respondents were served.

8. Whereas service is important, evidence of willful violation of a court order is more important in an application for committal to civil jail for contempt. I find the affidavit in support of the application to be in serious want of particulars and evidence of the dates and the manner of violation of the court order by the three respondents. The affidavit deals with only the issue of service. Indeed the alleged contemnor can even be found guilty without any service as long as he can be deemed to have been aware of the court order he is said to have violated. There are many decisions including the ***Basil Criticos -vs- Attorney General & 8 others (2012) eKLR*** decision to support that view. In the ***Basil Criticos case (supra)*** the court's view was that where a party acts and shows that he had knowledge of a court order, the strict requirement that personal service must be proved is rendered unnecessary and I agree with the holding in that case. In this case, personal service has not been shown to have been effected and violation of the court order has not been demonstrated to have occurred. The application has failed two very crucial tests.

9. It must be a relief to all involved now that the administrators of the estate of the deceased have now been substituted for the deceased and they can articulate their own stand in the matter.

10. Consequently, I find no merit in the application dated 10/5/2018 and I hereby dismiss it with costs to the respondents.

Dated, signed and delivered at Kitale on this 27th day of September, 2018.

MWANGI NJOROGI

JUDGE

27/9/2018

Coram: Before Mwangi Njoroge, Judge

Court Assistant - Picoty

Mr. Kiarie for defendant/respondent

Mr. Kaosa for the plaintiff/applicant

COURT

Ruling read in open court.

MWANGI NJOROGI

JUDGE

27/9/2018