



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT MIGORI

ELC CASE NO. 46 OF 2017

FREDRICK OCHIENG OGOLA.....PLAINTIFF/APPLICANT

Versus

OMAR FAISAL MOHAMED JAMA

ALFONSE OUMA OMBOK

ROSE AKINYI OKOTH

JOHN OCHIENG ONDU.....DEFENDANTS/RESPONDENTS

RULING

1. The plaintiff/applicant namely **FREDRICK OCHIENG OGOLA** through M/s Oguttu, Ochwangi, Ochwal and Co. Advocates filed an application by way of Notice of motion dated 10th March, 2018 under **Order 40 Rule 3 Civil Procedure Rules, 2010 and Section 1A, B, 3A & 63 (e) Civil Procedure Act and Section 4 & 5 of the Contempt Act, No. 46 of 2016** and all enabling Provisions of law. He is seeking orders as follows;-

a) Spent

b) That the Honourable court be pleased to cite and punish the 2nd, 3rd and 4th defendant/respondents, for disobeying and/or disregarding the lawful court orders issued and/or granted on the 18th July, 2017 and served upon the 2nd, 3rd and 4th defendants/respondents on the 21st day of July 2017.

c) Consequent to prayer (2) hereinabove being granted, the Honourable court be pleased to issue warrants of Arrest, to bring the 2nd, 3rd and 4th defendants/respondents before this honourable court for Committal to jail for disobedience.

d) Consequent to prayer (3) hereinabove being granted, the honourable court be pleased to commit the defendant/respondent to jail for a duration not exceeding six (6) months and/or such shorter period as the court may deem fit and expedient.

e) In the alternative, the honourable court be pleased to grant an order of sequestration to attach the properties of the 2nd, 3rd and 4th defendants, which properties be sold to defray the damages occasioned by the breach and/or disobedience of the lawful court order of maintenance of status quo dated 18th July 2017.

f) Costs of this application be borne by the defendants/respondents.

g) Such further and/or other orders be made as the court may deem fit and expedient.

2. The anchor of the application is the plaintiff/applicant's supporting affidavit sworn on the even date and copies of court order issued on 19/7/2017 (FOO1), an affidavit of service sworn on 28/7/2017 (FOO2) and 3 photographs (EOO3 (a) to (c)). The grounds of the application include :-

a. That the plaintiff/applicant herein was the lawful and legitimate proprietor of all that parcel of land otherwise known as **LR, SUNA EAST/AREA 'B' KWA/418** (hereinafter referred to as the suit property).

b. By virtue of the orders rendered on the 18th day of July 2018, the parties were directed and/or ordered to maintain status quo over

and in respect of the suit property.

c. Subsequently the duly extracted and sealed order, was served upon the defendants/respondents on the 21st day of July, 2017.

d. Notwithstanding the foregoing, the 2nd, 3rd and 4th defendants/respondents herein have since proceeded the 9th day of March 2018 to and ploughed the suit property under the use by and/or possession of the plaintiff/applicant occupation and use and thereby alienate, waste and/or destroy the status of the resultant parcel emanating from the suit property.

e. In the premises, the actions and/or omissions complained of, constitutes and/or amounts to disobedience of lawful court orders.

3. The application is opposed by the 2nd to 4th defendants/respondents, who are represented by Abisai & Co. Advocates. In a replying affidavit sworn on 13/4/17, the 4th defendant/respondent, averred inter alia, that the order of maintenance of status quo meant that the 3rd and 4th defendants/respondents were to remain in cultivation of the suit property on which they had planted maize and beans. That on the contrary the plaintiff/applicant has abused the status quo by invading the suit property of the defendants/respondents prompting the 2nd and 4th defendants/respondents to file Criminal cases vide Migori CM CR. Case Nos. 388/2017, 380/2017 and 3314/2017 involving threats to Kill and forcible detainer against the plaintiff/applicant. That the 2nd to 4th defendants/respondents have cultivated the land all seasons without failure and were not meant to vacate the suit property thus they have not contravened the court order.

4. The plaintiff filed a supplementary affidavit sworn on 17th November, 2017 pursuant to leave of the court granted on 31/07/2017. He averred, inter alia, that the 1st defendant/respondent unlawfully sub-divided and sold the suit property to the 2nd to 4th defendants.

5. Learned counsel Mr. Soire is for the 1st defendant. The instant application does not involve the 1st defendant.

6. On 31/5/2018, this court directed the parties to the application to argue it by way of written submissions. Learned counsel Mr. R. Abisai filed submissions dated 25/6/2018. The plaintiffs/applicants counsel did not file submissions.

7. Counsel submitted on the facts and evidence including photos annexed to the plaintiff/applicants supporting affidavit. He cited case law including Pricillah Wanja Kibui –v- James Kiongo Kibui & Charles Wambugu Gitonga (2014) e KLR, Sumimex Kenya Ltd –v- Hawo Bisharo Omar & 6 Others (2014) e KLR, Johnson –v- Grant (1923) SC 789 at 790 and Section 5 of the judicature Act (Cap 8).

8. I have carefully studied the entire application the replying affidavit, supplementary affidavit and submissions. I find the issues for determination as hereunder.

a) Existence of lawful court orders issued on 18/7/2017.

b) Have the 2nd to 4th defendants/respondents disobeyed the court orders?

c) Can the court issue contempt of court orders sought?

9. On the 1st issue, by a Notice of motion application dated 14/7/17 the plaintiff/ applicant sought, inter alia, an order of maintenance of status quo then obtaining over and in respect of the suit property. On 18/7/2017, this court issued the following order.

i. THAT the application be and is hereby certified urgent and the same be heard ex-parte in the first instance.

ii. THAT pending hearing and determination of the Notice of motion application dated 14th July 2017, the status quo currently obtaining over and in respect of LR NOS. SUNA EAST/AREA ‘B’ KWA/2106, 2107 & 2108, be maintained.

10. During inter partes hearing on 31/7/2017, the plaintiff/applicant’s counsel sought leave of the court to file a supplementary affidavit. Leave was granted and interim orders extended accordingly.

11. This court has power to make any order and grant relief as it deems fit and just. Interim or permanent preservation orders including injunctions under Section 13 (7) (a) of the Environment and Land Court Act 2015 (2011), may be granted by the court.

12. The court may direct and order the maintenance of the prevailing status quo in respect of the suit property in order to preserve it rather than an interim injunction in terms sought See; Musa Angira Angira –v- ICDC (2015) eKLR. Therefore the orders issued on 18/7/2017 were lawful in the circumstances.

13. On the 2nd issue, the orders issued by the court on 18/7/2017 contained a penal notice which reads.

“TAKE NOTICE that if you, OMAR FEISAL MOHAMED JAMA, ALFONSE OUMA OMBOK, ROSE AKINYI OKOTH, JOHN OCHIENG ONDU and/or any other person affected by this order, either by yourselves, agents, Servants and/or employees or any other person acting by your authority, disobey the court order herein, you shall be cited for contempt of court and/or disobedience of a court order and shall be liable to committal to jail for a term not exceeding six months and/or have your properties sequestered.”

14. The 2nd to 4th defendants/respondents contended that the plaintiff/applicant abused the orders for status quo prevailing on the suit property thus the criminal cases pending determination before the Chief Magistrate's Migori. An order for status quo merely leaves the situation on things as they stand pending the hearing of the reference or complaints; see **Kibui case** (supra).

15. I have noted the contested allegations of contempt of court against the 2nd to 4th respondents in this application. I bear in mind the phrase "contempt of court" as wisely discerned in, inter alia, **Johnson case (supra)** and the case of **Africa Management Communication International Ltd -v- Joseph Mathenge Mugo by Clyde LJ and A. Mabeya J** respectively.

16. I find a clear missing link between the orders issued on 18/7/2017 and the instant application as the standard of proof in contempt of court matters is higher than proof on a balance of probability. The plaintiff/applicant has not proved his application to the required standards.

17. Accordingly the plaintiff/applicants notice of motion dated 10th March 2018 fails and it is hereby dismissed with no orders as to costs.

DELIVERED, DATED and SIGNED at MIGORI this 18th day of September 2018.

G.M.A. ONGONDO

JUDGE

In the presence of: -

Mr. Oguttu Mboya learned counsel for the plaintiff/applicant

Mr. Jeremiah Soire learned counsel for the 1st defendant/respondent

Mr. Rogers Abisai learned counsel for the 2nd to 4th defendants/respondents

Mr. Tom Maurice – Court Assistant