

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 131 OF 2016

JOSEPH SENELWA NAKITARE.....PLAINTIFF/RESPONDENT

VERSUS

HILLARY KIPKOSGEI BOINETT.....DEFENDANT/APPLICANT

RULING

The application is dated 6.3.2018. The applicant seeks that the respondent be committed to jail for a period not exceeding six months for contempt of a court order. In the alternative, the respondent be punished in any appropriate manner the court deems fit.

The application is based on grounds that on the 27.5.2015, the court issued an order that status quo to be maintained on the suit land by parties not interfering and dealing with the suit land in any way pending hearing and determination of the application. The order was issued on 27.5.2016 and the said orders are still in force. The respondent is aware of the court order but has flagrantly disobeyed the same by alienating the same and putting up structures.

The respondent on his part states that he is not in contempt of court. The land was fenced by the defendant/Application before sale. Building materials were deposited on the land after purchase.

I have considered the application, supporting affidavit and the submissions of both counsels and do find that the court issued orders restraining both parties from entering and utilizing the land known as L.R NO 7914/23 in any manner whatsoever. It is being alleged that the plaintiff entered the land deposited building materials and began constructing structures and therefore disobeying the court order. The court observes that the law of contempt is meant to ensure that the dignity of the court is upheld. However, the burden of proof that the alleged contemnor is in contempt rests with he who alleges. The standard of proof is higher than the standard of proof in civil cases but not beyond reasonable doubt.

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 a application for contempt must prove beyond peradventure that the respondent is guilty of contempt.

Although the proceedings are civil in nature, it is well established that an applicant must prove the elements beyond reasonable doubt, at least higher than the standard in civil cases, the fact that the liberty of the defendant could be affected means that the standard of prove is higher than the standard in civil cases. It is incumbent on the applicant to prove that the defendant's conduct was deliberate in the sense that he or

she deliberately or willfully acted in a manner that breached the order. The prayer sought is for committal for contempt. The power to commit for contempt is one to be exercised with great care. An order committing a person to prison for contempt is to be adopted only as a last resort.

I have considered the evidence on record and do find it insufficient to reach the conclusion that the plaintiff is guilty for contempt. The photographs on record are not dated. It was prudent for the applicant to demonstrate the status of the land before filing of the suit and after the issuance of the court order. The respondent's argument that the materials were deposited on the land before the issuance of the court order is not controverted. This court reiterates that both parties are restrained from entering the parcel of land known as L. R. No. 7914/23 or dealing with the same in any manner until the hearing of the suit. The application is otherwise dismissed with costs.

Dated and delivered at Eldoret this 25th day of October, 2018.

A.OMBWAYO

JUDGE