



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC CASE NO. 73 OF 2016

1. NDURYA MWATSUMA NYONGO

2. NDORO CHAKA NDOREO

3. MURISA BINYAE NYAE.....PLAINTIFFS

VERSUS

NDUNGO BEJA *aka* MWACHARO MWAZUNZUMA.....DEFENDANT

R U L I N G

1. By a Notice of Motion dated **18th July, 2018**, the plaintiffs/applicants moved this court under section **1A, 1B, 3A and 63 of the Civil Procedure Act, Order 40 Rules 1, 2 & 3 (1) and 51 of the Civil Procedure Rules** and **Article 159 of the Constitution** seeking orders that this court do find that the defendant/respondent, **Ndungo Beja aka Mwacharo Mwanzunzuma** in contempt of the order of the court issued on **4th May, 2016** and jail him for a period not less than **12 months** and in the alternative to condemn him to pay a fine of not less than **Kshs.500,000/=**.

2. The grounds relied upon are that on **4th May, 2016** the court issued express temporary orders of injunction restraining the defendant either by himself, his agents, servants, employees or any other person acting for or claiming under him from entering, trespassing, cultivating, cutting down trees or clearing vegetation, constructing or erecting structures, harvesting timber or other produce, alienating and/or dealing with portion or portions of the **Mwadzine Clan** property being part of the property known as **Title No. Kwale/Mwereni/14** located in Lunga Lunga, Kwale County pending hearing and determination of this suit. That the said order was personally served upon the respondent on **14th May, 2016**, but the respondent by himself, his agents, servants, employees or other person acting for or claiming under him trespassed onto and/or invaded the said suit property and carried out the activities the acts complained of, thus the respondent is in contempt, hence the application.

3. The application is supported by the affidavit sworn by Ndurya Mwatsuma Nyondo on **18th July, 2016** and a supplementary affidavit sworn on **25th October, 2016**. The deponent has attached a copy of the affidavit of service sworn by Nzaro Nguwa, a process server on **14th May, 2016** in which he depones that he served the respondent with the said order on **11th May, 2016** but he declined to sign. The deponent has also annexed copies of photographs of the alleged unlawful activities.

4. The respondent in a replying affidavit sworn on **26th October, 2016** avers inter alia that he was not served with the order as alleged and that he is a member of the Mwereni Group and comes from the Mwabeja clan which is the dominant clan in the group ranch. He avers that the photographs annexed to the affidavit in support of the application are for houses which were constructed earlier and accuses the applicants of encroaching on his portion of the land and for trying to use the said court order to evict him before the case is decided.

5. The process server, Nzavo Bakari Nguwa was called for cross-examination. He stated that he served the respondent who was in the company of his son. On being cross-examined, he stated that the respondent is an old man who could not walk, though he changed the story during re-examination and stated that the respondent could walk.

6. Both parties filed written submissions through their respective advocates and also highlighted the same. I have considered the application, the affidavit on record and the submissions filed.

7. 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. In the case of **Gatharia K. Mutikika -vs- Baharini Farm Ltd [1985] KLR 227**, it was held as follows:-

“The courts take the view that where the liberty of the subject is, or might be involved in 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....it must be higher than proof on a balance of probabilities, almost, but not exactly, beyond reasonable doubt”.

8. In *Peter K. Yego & Others -vs- Pauline Nekesa Kode Nakuru HCCC 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.

9. 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.

10. In this case, the respondent is alleged to be an agent and/or community leader of Mwabeja clan who are alleged to have encroached and/or trespassed on the applicants' portion of the suit property. In the plaint, the applicants allege that the Mwabeja clan whose leader is the respondent has openly and defiantly failed and/or refused to obey or recognize the designated boundary between the Mwadzine clan and Mwabeja clan. Both clans are members of Mwereni Group Ranch, the registered owner of the suit property. In the said plaint, the applicants are seeking an order of vacant possession and an injunction against the defendant over the portion or portions of land belonging to the Mwadzine clan being part of **Title No. Kwale/Mwereni/14.**

11. In the replying affidavit, the respondent avers that he has constructed his dwelling house within the portion belonging to the Mwabeja clan and that the photographs attached to the affidavit in support of the application are for houses constructed much earlier and are not new. Further, the respondent has deposed that some of the photographs shown are not on his portion of the land.

12. From the material placed it is apparent that both the applicants and the respondent are accusing each other of encroaching on the other's portion of land. Moreover the respondent is being sued as an agent or leader of his Mwabeja clan. It is not clear whether the actions alleged are attributed to the respondent as an individual or as a leader or agent of his said clan. Furthermore as matters stand, it is not clear which portion or portions belong to which party.

13. As pointed out earlier, in an application of this nature we are dealing with the liberty of a person and such an order ought to be granted in the cleanest circumstances. In the instant application, I am unconvinced that the allegation of contempt of court has been proved to the required standard. In as much as the respondent may have been served with the court order issued on **4th May, 2016** I am not satisfied that the applicants have demonstrated that the respondent has wilfully disobeyed the said order. Moreover, the acts allegedly committed by the respondent are not precise.

14. It is my finding that the respondent is not in contempt of court and the Notice of Motion dated **18th July, 2016** is hereby dismissed with no order as to costs.

Dated, signed and delivered at Mombasa this **17th** day of **December, 2018.**

C. K. YANO

JUDGE