



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 346 OF 2013

SAMSON K. A. TIM.....1ST PLAINTIFF

STEPHEN KIPTUI KIBOWEN.....2ND PLAINTIFF

VERSUS

GRACE KIMOI BITTOK.....1ST DEFENDANT

COLLINS K. BITTOK.....2ND DEFENDANT

ELVIS K. BITTOK.....3RD DEFENDANT

NELSON O. ODHIAMBO 286.....4TH DEFENDANT

HON. ATTORNEY GENERAL.....5TH RESPONDENT

THOMAS KIPTIM.....6TH RESPONDENT

RULING

The application herein is dated 2.2.2016 wherein Mr. Samson K. A Tim, the applicant therein prays for an order of committal to be made against the 1st, 2nd, 3rd, 4th and 6th respondents for disobeying court order made on 30th September, 2014 giving orders of injunction in respect of parcels No. Lembus/Torongo/790/791 and 792 and or any dealings in the land pending the determination of the suit and further orders given on 24th November, 2015. That an order of committal to be made against 4th defendants/respondents to prison for such period as this Honourable Court may deem fit and just in that he has disobeyed the order made herein by this Honourable Court on the 30th September, 2014.

That an order of committal to be made against 6th defendants/respondents to prison for such period as this Honourable Court may deem fit and just in that he has disobeyed the order made herein by this Honourable Court on the 30th September, 2014. That the costs of this application be awarded to the applicant.

The application is based on grounds that this Honourable court did on the 30th September, 2014 grant an order of injunction barring the 1st, 2nd, 3rd defendants any dealings in respect of properties namely Title No. Lembus/Torongo/790/791 and 792 pending hearing and determination of this suit. That the respondent herein who were represented by counsel are aware of the orders in place and were further served with the order and a penal notice. However, the 1st, 2nd and 3rd respondents herein have ignored

the orders in question and have continued to graze their animals on parcel numbers, Lembus/Torongo/790/791 and 792 with the advice of the 4th respondent urging them to ignore the said court order citing grounds that the caution is in place and that there is nothing to be done with the court order. According to the applicant, the 4th respondent's action smacks of impunity to court processes by allowing 6th respondent namely Thomas Kiptim to register caution in the said suit properties regardless of the existing court process in place and the existence of a court order. The respondents' conduct undermines the authority and dignity of this honourable court.

The application is supported by the affidavit of Samson K. A. Tim who states that he instituted a suit against the 1st, 2nd, 3rd, 4th and 5th respondents with High Court of Kenya at Eldoret, Environment and Land Court Land Case No. 346 of 2013. That contemporaneous with filing the suit, he sought orders of mandatory injunction to bar the 1st, 2nd and 3rd respondents or any such person under them to cease forthwith from wasting, ploughing, leasing, grazing livestock selling alienating, subdividing or otherwise dealing with land parcels No. Lembus/Torongo/790/791 and 792.

The application was heard and the ruling delivered on 30th September, 2014 in his favour and that on the same date, the honourable court issued an order duly endorsed with penal notice. That the respondents herein were duly served with the order of the honourable court. The 4th respondent despite knowledge of court order and pending court case in which he is a party and with total disregard of the provisions of law further proceeded to revenge against the order of this honourable court by advising the 1st, 2nd and 3rd respondents to come with stranger to this suit the one Thomas Kiptim, the 6th respondent who is problematic and had cautioned previously his other parcel of lands known as Lembus/Torongo/721 allowing him to caution the said land parcels No. Lembus/Torongo/790/791 and 792.

The said 6th respondent, Thomas Kiptim who is a new respondent creating problems who also have been assisted by the 4th respondent to disturb the applicant's development and to enjoy freedom of property ownership is now being brought in to caution the properties of the applicant in the illegal benefit of the 1st, 2nd and 3rd respondents to his detriment by the 4th respondent actions which allowed the 1st, 2nd and 3rd respondents to continue ploughing and more so grazing livestock within the said parcel of land known as Lembus/Torongo/790/791 and 792.

The applicant laments that despite the respondent's knowledge of the orders of this honourable court, they have refused to comply even after being advised withdrawal of signatory and stamp by advocate who commissioned the said caution, the 4th respondent continued, ignored citing that there is nothing to be done with the court order provided that there is a caution registered in land records.

Further, it is the applicant's contention that the 4th and 6th respondent's actions together with 1st, 2nd and 3rd respondents clearly bring the dignity of this honourable court to disrepute and undermines the authority of the honourable court even after they were served with further order issued by this honourable on 24th November, 2015 they continued to ignore. That the order given on 24th November, 2015 was duly served and therefore the 5th respondent is to blame over this issue hence failure to advise the 4th respondent to respect, obey this honourable court order the issue of this application.

The applicant prays that this application be allowed and the 1st, 2nd, 3rd, 4th and 6th respondents be committed to imprisonment since they are all in contempt of this honourable court. Thus, this honourable court does not tolerate their actions of impunity.

Mr. Collins K. Bittok filed a replying affidavit stating that he has never been served with the court orders given on 30th September, 2014 and he has never seen them. That he is working in Naivasha and he rarely goes home and he has not done any grazing. That his mother is Grace Kimoi Kibittok and that the plaintiff is brother to his late father Joseph Kibittok Kiptim (deceased). That since his childhood till now, he has never seen the plaintiff cultivate or reside on the parcel of land hence the application is done maliciously. That his late father and his mother were cultivating the land all along and to bring an

application of this nature is calculated to evict him and other six (6) siblings on the parcel of land. That his elder brother also is residing on the same land with his family and he cultivates and has animals on the land. That there is succession cause No. 87 of 2008 at Nakuru Law Courts awaiting determination.

That Thomas Kiptim is the son of the plaintiff and resides on another farm and he has never entered or cultivated neither do grazing on the parcel of land in question. That he has never done farming or done grazing as stated by the plaintiff on the suit parcel of land.

M/s Grace Kimoi Bittok states that she is the 1st respondent herein and she is the mother of 2nd, 3rd respondents in this suit. That the 6th respondent, Thomas Kiptim is the son of the applicant and he lives in a different parcel of land L.R. No. Lembus/Torongo/721. That the applicant subdivided parcel No. Lembus/Torongo/402 without the awareness of the whole family which parcel belonged to their grandfather, Kiptim Arap Lagat (deceased) into three (3) portions L.R. No. Lembus/Torongo/790, 791 and 792. That on the ground, the parcels are not distinct it is one parcel and none can see the boundaries or how it was subdivided. That before the said Kiptim Arap Lagat passed on, he had given this parcel to her late husband Joseph Kibittok Kiptim. That when she got married to the said Joseph Kibittok Kiptim, she lived in the said farm all along until now. That she has six (6) children namely:

(a) Joyce Jesang Kibittok

(b) Mathew Kipruto Kibittok

(c) Judy Jeptarus Kibittok

(d) Nixon Kiprop Kibittok

(e) Alvin Kiprotich Kibittok

(f) Arnold Kipkemoi Kibittok

The sons are grown up and some are married and reside on this land. That Mathew Kipruto Kibittok lives on the land and married and having children and have cows and cultivates the land. That Alvin Kiprotich Kibittok is working in Naivasha and he rarely comes home and does not farm and he has no cows. That Thomas Kiptim the son of the applicant lives elsewhere and he does not go to this farm at all. That the plaintiff is malicious in making this application because he has never entered or lived in this parcel of land and he has never cultivated. That the reason she is saying he is malicious is that he has all along said he does not recognize the defendant and her children apart from Joyce Jesang and Mathew Kipruto.

The 1st respondent deposes that she has lived in this parcel since she was married and does cultivation in a small portion of the land to get food for herself and the children. That their residences, buildings, on which the family reside are on this land and the plaintiff's applications is calculated to evict her and her children from the farm.

That the respondents have filed objection proceedings in Nakuru High Court vide Nakuru High Court P & A Cause No. 57 of 2008 and also made an application for stay and obtained the orders of maintaining the status quo. She promises that she will not sell, alienate the parcel of land until this matter is determined and that of Nakuru. That the application is not made in good faith and she has not intended to violate court orders. She is obedient but she also wants to say she does not have any other parcel of land or place to go.

The 4th respondent, Nelson O. Odhiambo states that he did not flout the court order dated 30.9.2014 as alleged by the applicant but he went ahead and registered the same in all the green cards in issue to the benefit of the applicant on 1.10.2014. The 6th respondent placed a caution claiming beneficiary interest on 5.8.2014 against parcels of land No. Lembus/Tongoro/790, 791 and 792, way before the applicant served him as the 4th respondent with the court order dated 30th September, 2014. That he summoned both the

cautioner and the applicant for a caution hearing in which the applicant herein failed to appear for reasons best known to him. He claims to be a custodian of public documents at the Koibatek Land Registry and he cannot in anyway waste, plough, lease, graze livestock, sell or alienate, charge, subdivide or otherwise deal with the land parcels in issue.

He further claims to be a law-abiding citizen employed by the Government as a Land Registrar and he is also an officer of the court and as such, he cannot in any way disobey court orders as he is well aware of the consequences of such disobedience and that he has never advised any of the other respondents to disobey court orders as alleged by the applicant. That the applicant's application now before court is misconceived, malicious, vexatious and frivolous and is a waste of precious court's time. That he respectfully requests this honourable court to dismiss the applicant's application now before court and find that he is not in contempt of court as alleged by the applicant as the alleged caution was registered before the court order was issued and further, since the court order was registered as ordered.

The applicant filed three supplementary affidavits whereas he states that the 1st and 2nd respondents were duly served. Moreover, that the caution on record is in contempt of court order and the Registrar by failing to remove the caution is in contempt of court.

Mr. Atim submits that the defendants are in contempt of court by ploughing and grazing their cattle in the suit land. Moreover, that the 4th respondent breached the court order by registering a caution. Moreover, that service of the order was effective.

The 1st, 2nd and 3rd defendants submit that they have never breached any court order since they are law abiding citizens. The defendants submit that they do not reside on the land but one Mathew Bittok resides on the land and that the land is family land. The 1st defendant resides in the family land. The defendants further submit that the court issued orders of stay of proceedings pending the determination of Nakuru High Court P & A Case No. 57 of 2008 which has orders of status quo.

I have considered the application, affidavits in support and reply including supplementary affidavits and do find that on the 30.9.2014, this court issued an order that pending the hearing and determination of this suit, there be an order of injunction barring 1st – 3rd defendants from wasting, ploughing, leasing, grazing livestock, selling, alienating, charging, subdividing or otherwise dealing with the land parcels Lembus/Torongo/790,791 and 792. The property in dispute is also subject to Nakuru Succession Case No. 57 of 2008 in the matter of the Estate of the late Kiptim Lagat (deceased) wherein the court ordered that the status quo to be maintained on 27.5.2015. On 24.11.2015, this court ordered that this matter be stayed till the determination of Succession Cause No. 57 of 2008.

In Hadkinson Vs. Hadkinson [1952] 2 All ER 567 at 569 it was stated as follows-

“A party who knows of an order, whether null and void, regular or irregular, cannot be permitted to disobey it...it would be most dangerous to hold that the suitors or their solicitors could themselves judge whether an order was null and void, whether it was regular or irregular. That they should come to the court and not take upon themselves to determine such a question, that the course of a party knowing of an order which was null and irregular and who might be affected by it was plain. He should apply to the court that it might be discharged. As long as it existed, it must not be disobeyed”.

There is a long line of local decisions upholding that position. See for example Mutika vs. Baharini Farm Ltd [1985] KLR 227, Benard Kongo Njau –vs- City Council Of Nairobi & Another, Nairobi High Court ELC Case No. 495 of 2009 (unreported), and Shah & Another t/a Lento Agencies –vs- National Industrial Credit Bank Ltd, [2005] 1 KLR 300. In certain instances, a contemnor will not even be heard on review until he purges the contempt. See Mawani v Mawani [1977] KLR 159.

I have considered the submissions of the applicant and all counsels and do find that the facts herein are

unique as there are pending proceedings in Nakuru Succession Cause No. 57 of 2008 wherein the respondents are the objectors and there exist an order of status quo pending the determination of the Succession Cause. Moreover, there is an order of stay of proceedings in this matter pending the determination of the succession cause.

Ultimately, this application lacks substance and is dismissed with no order as to the costs as this is a family matter.

DATED AND DELIVERED AT ELDORET THIS 31 ST DAY OF MARCH, 2017.

A. OMBWAYO

JUDGE