

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC NO. 814 OF 2014

WILLIAM KAROMO MURUNDU.....PLAINTIFF/APPLICANT

VERSUS

AMOS NGANGA KARIUKI DEFENDANT/RESPONDENT

RULING

There has been along running dispute between the parties herein going back to the year 2007 over the boundaries of LR No. Githunguri/Ikinu/1402 owned by the Defendant's father and L.R No. Githunguri/Ikinu/1403 owned by the Plaintiff. The two parcels of land are hereinafter referred to as "Plot No. 1402" and "Plot No. 1403" respectively. Sometimes in the year 2007, the Plaintiff lodged a claim against the Defendant at Githunguri Land Disputes Tribunal over the boundaries of the suit properties. In an award made on 31st August 2007, the said tribunal directed that the District Surveyor do visit Plot No. 1402 and Plot No. 1403 with a view to marking the boundaries of the two parcels of land using the Registry Index Map. The said award of the tribunal was filed at the Senior Resident Magistrate's Court at Githunguri and made a judgment of the Court on 20th December 2007 and a decree issued on 22nd February, 2008. Following the issuance of the decree, the District Surveyor, Kiambu visited the site of the suit properties on 20th August, 2008, marked and pointed to the parties the boundaries of Plot No. 1402 and Plot No. 1403. From the material on record, there appears to have been subsequent disputes over the same boundaries which were presented before the Senior Resident Magistrate's Court at Githunguri which arose from the manner in which the surveyor had marked the boundaries of the suit properties. On 14th August 2013 the Resident Magistrates Court at Githunguri held that the court was *functus officio* and that it had no jurisdiction to determine boundary disputes.

The Plaintiff filed this suit on 20th June 2014 seeking a permanent injunction to restrain the Defendant from trespassing on Plot No. 1403. The Plaintiff averred that the Plaintiff was the owner of Plot No. 1403 and that the Defendant had without any colour of right invaded the said parcel of land and started quarrying thereon and cutting down trees. Together with the plaint, the Plaintiff filed an application by way of Notice of Motion dated 19th June, 2014 seeking a temporary injunction restraining the Defendant from illegally entering Plot No. 1403 and quarrying stones and cutting trees thereon pending the hearing and determination of this suit. The application was served upon the Defendant together with the plaint but the Defendant did not respond to the same.

When the application came up for hearing interpartes on 8th July 2014 before Nyamweya J. the same was allowed as unopposed. The court restrained the defendant from "illegally entering land parcel GITHUNGURI/IKINU/1403, quarrying stones, cutting trees therein pending the hearing and determination of the suit herein." The order was extracted and issued on 11th July, 2014.

Between 8th July 2014 when the order was made and 16th March 2016, when the present application was filed, a period of over one(1) year, no further action was taken in the matter. The Plaintiff did not even take out summons to enter appearance or serve the same upon the Defendant.

In the Notice of Motion application dated 16th March, 2016, the Plaintiff has sought an order for the committal of the Defendant to jail for a period not exceeding six (6) months and a fine of Kshs.500,000/= for disobeying the order which was made herein by Nyamweya J. on 8th July, 2014 aforesaid. The application was brought on the grounds that despite the order which was made herein on 8th July, 2014

restraining the Defendant from entering Plot No. 1403 and cutting down trees and carrying out quarrying activities, the Defendant had illegally entered the said parcel of land and carried out quarrying activities and had also cut down trees and coffee bushes thereon. In his affidavit in support of the application, the plaintiff stated that the Defendant who had entered Plot No. 1403 and interfered with the boundary thereof had encroached on the said parcel of land and extended the quarrying activities which he was carrying out on his father's parcel of land, Plot No. 1402 to Plot No. 1403. The Plaintiff stated that despite the orders issued herein on 8th July 2014, the Defendant had continued with quarrying, cutting down trees and coffee bushes on the suit property. The Plaintiff annexed photographs said to have been taken on Plot No. 1403 showing the activities complained of.

The application was opposed by the Defendant through Notice of Preliminary Objection dated 11th April 2016 and replying affidavit dated 9th May 2016. In his Notice of Preliminary Objection, the Defendant contended that this suit is res judicata the dispute between the parties having been heard and finally determined by the Land Disputes Tribunal at Githunguri in Land Tribunal Case No. 17 of 2007 whose decision was adopted as a judgment of the court on 20th December 2007. In the replying affidavit, the Defendant contended that the Plaintiff having failed to take out and serve summons to enter appearance upon the Defendant, this suit had abated. The Defendant termed the Plaintiff's application malicious, false and misleading. The Defendant denied that he had disobeyed the order which was made herein on 8th July 2014. The Defendant contended that he has never encroached on Plot No. 1403 since 20th August 2008 when the District Land Registrar visited Plot No. 1402 and Plot No. 1403 and marked the boundaries thereof pursuant to the decree that was issued by the Resident Magistrate's court at Githunguri on 20th December, 2007. The Defendant contended that the District Surveyor who visited Plot No. 1402 and Plot No. 1403 placed beacons on the boundaries between the two parcels of land and some of the Plaintiff's coffee bushes were found to be on Plot No. 1402 and in respect of which the Plaintiff sought compensation. The Defendant contended that it is when they failed to agree on compensation that the Defendant went back to the Resident Magistrate's Court at Githunguri and attempted to reopen the proceedings which had otherwise been closed. The Defendant termed the suit herein and the current application an abuse of the process of the court.

On 12th July 2016 the court directed that the Plaintiff's application be heard by way of written submissions. The Plaintiff filed his submissions on 12th October 2016 while the Defendant chose to rely on his Notice of Preliminary Objection and replying affidavit.

I have considered the Plaintiff's application together with the affidavit filed in support thereof. I have also considered the Defendant's notice of preliminary objection and the replying affidavit which were filed in opposition to the application. I have also considered the written submissions which were filed by the Plaintiff together with the authorities cited in support thereof. The onus was upon the plaintiff to prove the charge of contempt brought against the Defendant. Committal proceedings are quasi criminal in nature due to the fact that the alleged contemnor may lose his liberty if the contempt is proved against him. For this reason the standard of proof of contempt is higher than a balance of probabilities. See, the case of Mutitika-vs-Baharini Farm Ltd. (1985) KLR 227. On the material before me, I am not satisfied that the Plaintiff has met this higher standard of proof. The order of 8th July, 2014 which is the basis of these proceedings was made ex parte in the absence of the Defendant. The order restrained the Defendant from engaging in certain activities. The Plaintiff has contended that despite the existence of the said order, the Defendant committed the acts which were prohibited by the court. For the Defendant to be held in contempt of the said court order, the Plaintiff had to establish that the order said to have been disobeyed was either served upon the Defendant or was within his knowledge. The Plaintiff has not placed any evidence before the court showing that the Defendant was served with the order of 8th July 2014 or that he had knowledge of the same. Apart from proving service of the order upon the Defendant, the Plaintiff also had a duty to prove that the Defendant indeed disobeyed the order. The Plaintiff has contended that while the order of 8th July 2014 was in existence, the Defendant entered Plot No. 1403 and continued with quarrying activities thereon. The Plaintiff also accused the Defendant of cutting down trees and coffee bushes on Plot No. 1403. In his affidavit in support of the application, the Plaintiff had exhibited photographs showing two (2) trees which had been cut. There is no evidence as to when the

trees were cut and that they were indeed cut by the Defendant. There is also no evidence of quarrying activities or coffee bushes which the Defendant has been accused of cutting down. There is also no evidence that the trees which have been exhibited by the Plaintiff were cut on Plot No.1403. Since the Defendant had denied all the Plaintiff's allegations, the Plaintiff had a duty to prove each and every element of his case against the Defendant. The Defendant had claimed that since 20th August 2012 when the beacons were placed on the boundary of Plot No. 1402 and Plot No. 1403 he had restricted his activities to Plot No. 1402. The Plaintiff has not placed any evidence before the court showing that the activities of the Defendant complained of are being undertaken on Plot No. 1403 across the beacons which were placed by the District surveyor on 20th August 2012. I have noted that when the Plaintiff brought this suit, he did not even disclose to the court that there had been other proceedings between the parties over the same subject matter. Although I do not agree with the Defendant that this suit is res judicata, the Plaintiff had a duty to disclose to the court the proceedings which they had before Githunguri Land Disputes Tribunal and the Resident Magistrate's Court at Githunguri which concerned the boundaries of Plot No. 1402 and Plot No. 1403.

For the foregoing reasons, it is my finding that the Plaintiff has not proved the charge of contempt against the Defendant. The Notice of Motion 16th March 2016 lacks merit and the same is accordingly dismissed with costs to the Defendant.

Delivered and Signed at Nairobi this 31st day of March, 2017

S. OKONG'O

JUDGE

In the presence of

N/A for the Plaintiff

N/A for the Defendant

Kajuju Court Assistant