



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT NAKURU

ELC NO. 302 OF 2013

KESSIAH WANJIKU KURIAPLAINTIFF/RESPONDENT

VERSUS

JOSEPH NDIRANGU MWANGI..DEFENDANT/APPLICANT

RULING

(Application alleging disobedience of order of injunction; order said to have been violated being an order stopping interment of a body on the suit land; allegation that the respondent is now cultivating the land; no connection between the order stopping burial and cultivating; application dismissed).

1. The application before me is that dated 13 February 2017 filed by the defendant. It is an application said to have been brought pursuant to the provisions of Section (sic) 51 Rule 1, Order 40 Rules (1) and (2) of the Civil Procedure Rules, and Sections 1A, 1B, 3 and 3A of the Civil Procedure Act and other enabling provisions of the law and the inherent powers of the court. The main prayer in the application seeks an order that the plaintiff be summoned for purposes of punishment for contempt of court in respect of the ruling issued on 20 September 2016. It is contended that in the said ruling, the court declared the defendant to be the rightful owner of the land parcel Nyandarua/Ol Kalou Salient/342 (hereinafter "the suit land") and issued an order of injunction, restraining the plaintiff from the said land. It is stated that the plaintiff in blatant disregard of the ruling, has trespassed into the land and is now harrowing it for purposes of cultivation.
2. The supporting affidavit has been sworn by the defendant himself. He has inter alia averred that the respondent has refused to comply with the order issued on 20 September 2016 yet she is aware of it as she was in court when the ruling was made. He has annexed photographs said to show the activities of the respondent.
3. Despite being served, the respondent has not replied to the application.
4. At the outset, it is apparent that the applicant has cited the wrong provisions of the law. First, he must have meant Order 51 instead of Section 51, which provides for the manner in which applications are to be made, i.e by way of Notice of Motion. Order 40 Rule 1 and 2 cover applications for injunction. This clearly is not an application for injunction and these provisions do not apply. I am however prepared to construe this application as one based on the provisions of Order 40 Rule 3, which sets out the consequences of not obeying an order of injunction.
5. The applicant has contended that the respondent has gone against an order issued on 20 September 2016. I have looked at the order made on that day. It is actually a ruling delivered in respect of an application dated 12 July 2016, vide which the applicant applied to have the respondent restrained from interring the body of her brother, on the suit land. I allowed the application and ordered the respondent

not to enter the body in the suit land. For the avoidance of doubt, there was never any declaration issued in the ruling, that the suit land belongs to the applicant. Indeed, that order can only be made after hearing the suit.

6. It has not been claimed in this application that the respondent has interred a body in the suit land so it cannot be argued that whatever activities being complained of are contrary to the order of 20 September 2016. This is an application for contempt and the court must ensure that it is clear to the respondent, what order has been violated, and proof of the said violation tendered, before arriving at a conclusion that there has been a disobedience of the same.

7. I am afraid that in the circumstances of this application, I have not been persuaded that the activities of harrowing are against the order issued on 20 September 2016. If it had been claimed that the respondent interred a body, then I would have interrogated that. I do not wish to go further to determine whether the activities complained of are against other orders issued in this suit, for if I do so, then I will be condemning the respondent on a complaint that is not before me. The complaint that is before me alleges a violation of the ruling of 20 September 2016 and as I have demonstrated above, I have not found any disobedience of the same since no body has been interred by the respondent.

8. I do not see the need of saying more. I find no merit in this application and it is hereby dismissed with costs.

9. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 15th day of March 2017.

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU

In presence of : -

Mr. Opar for the defendant/applicant

No appearance on the part of the plaintiff/respondent

Court Assistant: Nelima

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU