



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT NYERI

E.L.C CASE NO. 48 OF 2014

PAULINE NYAMBURA

ANN WANJIRU NDIRANGU

ESTHER MWIHAKI WANJOHI

PETER WANGOMBE NDIRANGU..... RESPONDENTS

-VERSUS-

KARONGO NDIRANGU

JOSEPH WANG'OMBE NDIRANGU

MAINA WAGATUA

NDIRAGU WAGATUA

GITONGA WAGATUA

NDUNG'U WAGATUAAPPLICANTS

RULING

1. The application dated **21st October, 2015** seeks to punish Ann Wanjiru Ndirangu; her son Mwangi Wanjiru, brother to the area assistant chief one Mutahi Wambugu for disobedience of the orders of this court issued on 18th August, 2014.
2. The application also seeks to restrain the area assistant chief, Mr. Kariuki Wambugu, from interfering with the suit properties.
3. It is the applicants' case that on 15th October, 2015 the persons sought to be punished came to the suit property and planted maize on the parcel of the suit property cultivated by him.
4. The order allegedly breached by the persons sought to be punished was for maintenance of status quo on the suit properties pending the hearing and determination of the application.
5. Vide the replying affidavit filed on 12th February, 2013 it is contended that the respondents did not

disobey the court order hereto. Terming the application frivolous, vexatious, bad in law and an abuse of the court process, the respondent urged the court to dismiss it with costs to them.

6. When the application came up for hearing, the applicant **Mr. Karongo**, reiterated his contention that the persons named in paragraph 1 of this ruling, entered the portion of the suit property he occupies and planted maize on top of what his wife had planted.

7. He informed the court that his wife reported the incident to the police vide OB No.10/10/2015 and contended that none of the persons sought to be punished responded to his application.

8. Arguing that the deponent of the replying affidavit, Paula Catherine Maina, could not swear an affidavit on behalf of the respondents because she does not know what was going on, the applicant urged the court to allow the application.

9. Counsel for the respondents, **Mr. Wahome**, inter alia, submitted that the application seeks to commit to jail persons who are not party to the application for contempt.

10. Terming the application incompetent, Mr. Wahome, submitted that the alleged contemnors cannot be punished for acts of strangers.

11. On propriety of the affidavit sworn in reply to the application, he stated that the deponent was given authority by the other respondents to plead on their behalf.

12. Mr. Wahome further contended that there were no orders restraining the respondents from utilising the suit properties.

13. In a rejoinder, the applicant clarified that it is the 2nd respondent's son who entered the suit property.

14. Explaining that the order was for maintenance of status quo, the applicant explained that the application targets those who disobeyed the order.

Analysis and determination

15. The sole issue for determination is whether the applicant has made up a case warranting the issuance of the orders sought.

16. Concerning that issue, having read and considered the affidavit evidence adduced in this case, I note that the applicants' application for contempt is fatally defective in that the order on which it is premised does not have a penal notice as by law required. In this regard see the case of **Ochino & Another v. Okombo & Others & 4 Others (Civil Appeal NO.36 OF 1989** where the Court of Appeal held:

"... no Order of court requiring a person to do or to abstain from doing any act may be enforced (by committing him for contempt) unless a copy of the order has been served personally on the person required to do or abstain from doing the act in question. The copy of the order served must be endorsed with a notice informing the person on whom the copy is served that if he disobeys the order, he is liable to the process of execution to compel him to obey it." (*Emphasis supplied.*)

17. Besides, the application seeks to punish people who were not party to the application for contempt. It has not been demonstrated that those people knew about the order and willfully disobeyed it.

18. On the merits of the application, upon review of the evidence adduced in support of the application, I find it to be insufficient to prove the case urged against the respondents to the required standard of proof, which is proof beyond reasonable doubt. In this regard see the case of **Sam Nyamweya & 3 others v Kenya Premier League Limited & 2 Others (2015)eKLR** where it was held: **"... contempt proceedings are of a criminal nature and involve, if proved, loss of liberty, the applicant must**

therefore endeavor to prove all facts relied on beyond reasonable doubt...”

19. Also see the case of **Eliud Muturi Mwangi (Practising in the name and style of Muturi & Company Advocates) v LSG Lufthansa Services Europa/ Africa GMBH & another [2015] eKLR** where **Gikonyo J.**, stated: **“...the appropriate standard of proof which must be attained is as was set out in the case of Ochino & Others v. Okombo & Others (1989) KLR where the Court of Appeal held: “...the standard of proof in contempt proceedings must be higher than proof on a balance of probabilities, almost but not exactly beyond reasonable doubt.”**

20. The upshot of the foregoing is that the application has no merit. Consequently, I dismiss it with costs to the respondents.

Dated, signed and delivered in open court at Nyeri this 9th day of March, 2017

L N WAITHAKA

JUDGE

In the presence of:

Mr. Muchiri wa Gathoni h/b for Mr. Wahome for the 1st, 2nd & 4th plaintiffs

N/A for the 3rd plaintiff

N/A by the defendants/applicants

Court clerk – Esther