



REPUBLIC OF KENYA

IN THE E.L.C COURT OF KENYA AT EMBU

E.L.C NO. 351 “A” OF 2015 (O.S)

ABIDA WERIMBA MWANIKI.....1st PLAINTIFF

MARTIN NJUE MWANIKI.....2nd PLAINTIFF

EDWIN MUTURI MWANIKI.....3rd PLAINTIFF

VERSUS

SAMWEL NJERU M’NGENDO.....1st DEFENDANT

NANCY WANGARI KATHANGU.....2nd DEFENDANT

MOSES MWANGANGO NJERU.....3rd DEFENDANT

RULING

1. On or about 9th December 2015 the Advocates for the parties recorded three consent orders with respect to the pending suit and the subject matter of the suit. The orders recorded were as follows:

a. The status quo on land parcels No. KYENI/MUFU/8575, 8576, 8577, 8578 and 8579 the subjects matter of this case be and is hereby maintained pending the hearing and determination of this suit.

b. The parties do comply with Order 11 of the Civil Procedure Rules in the next two months.

c. That this case be mentioned on 5th February 2016 to confirm compliance and fix a hearing date.

2. On or about 30th May 2016, the Plaintiffs’ advocate filed a Notice of Motion dated the same day under certificate of urgency seeking, *inter alia*, leave to commence contempt of court proceedings against the Defendants for allegedly violating the order of *status quo* recorded by consent on 9th December 2015.

3. The said application was placed before Justice Boaz Olao who informed the Plaintiffs’ advocate to proceed and file the application since leave was not required. The Plaintiff consequently filed a Notice of Motion dated 8th June 2016 and filed on 9th June 2016 seeking committal to civil jail of the Defendants for disobedience of the orders issued on 16th December 2015 among other reliefs.

4. The Plaintiffs appear to have abandoned the prayers for orders of interlocutory injunction sought in prayers 2 and 3 of the said application. Their advocate only submitted on prayer No. 5 on contempt of court and prayer No. 6 on costs of the application.

5. The Defendants filed both grounds of opposition to the application and a replying affidavit. The grounds of opposition raised two main issues in opposition to the application. First, it was stated that the application had been overtaken by events since the Plaintiffs had voluntarily vacated the subject parcels of land. Second, it was stated that leave had not been sought to initiate the instant proceedings.

6. The Defendant's replying affidavit denied violation of the court orders and the alleged destruction of trees, crops and other properties. It was also denied that they had in any way interfered with the Plaintiff's occupation but that the latter had voluntarily removed their structures and vacated.

7. It would appear that the parties agreed by their conduct to dispose of the said application dated 8th June 2016 by way of written submissions. The Plaintiffs' advocate consequently filed her written submissions on 8th December 2016 whereas the Defendants' submissions were filed on 28th February 2017.

8. The Plaintiffs' advocate submitted that the order which was violated was made by consent of the advocates for the parties on 16th December 2016. The said orders were issued when the Plaintiffs were in occupation of the various properties which are mentioned in the consent order. She submitted that the Plaintiffs were to continue peacefully enjoying occupation until the suit is heard and determined. A perusal of the court file, however, reveals that the consent orders were recorded on 9th December 2015 and issued on 16th December 2015.

9. The Plaintiffs' advocate further submitted that between 6th and 20th May 2016 the Defendants hired a group of goons who descended on the subject properties and destroyed trees, food crops and other agricultural produce. She referred to police abstract reports of malicious damage to property, a report by an agricultural extension officer and photographic evidence of the damage. She, therefore, sought an order for committal of the Defendants for contempt of a court order.

10. On the other hand, the Defendants' advocate submitted that the Plaintiffs had failed to satisfy the requirement for punishing an alleged contemnor. He listed the following requirements;

- a. The existence of a clear and unambiguous court order.
- b. Service of the court order or knowledge of the court order.
- c. Disobedience of the court order.

11. Although the Defendants' counsel admitted the existence of the court order and knowledge thereof, he nevertheless submitted that the order was ambiguous on the meaning of "*status quo*". He further submitted that there was no evidence of service of the court order upon the Defendants. He relied upon the cases of **Ochino & Another vs Akombo & 4 others [1989], KLR, Sam Nyamweya & others Vs Kenya Premier League Ltd & 2 others [2015] eKLR, and Gibson Kariuki Vs Mugo Mbacho & 4 others.**

12. The Defendants' counsel also submitted that the application for contempt of court had been overtaken by events since the Plaintiffs had voluntarily vacated the subject properties. He submitted that the continued prosecution of the application is in bad faith, a waste of judicial time and an abuse of the court process.

13. The Plaintiffs' advocate conceded that the Plaintiffs had vacated the subject property but disputed that it was voluntary. She submitted that the vacation was as a result of the Defendants' aforesaid actions which had made life unbearable for them.

14. The main issues for determination in this application may be summarized as follows:

- a. *Whether the Plaintiffs were required to obtain leave of court to institute contempt of court proceedings;*

b. Whether the Plaintiffs have established or proved the alleged contempt of court against the Defendants.

15. The first issue may be disposed of very quickly. It is on record that the Plaintiffs filed an application dated 30th May 2016 seeking leave to institute contempt of court proceedings, among other reliefs. The said application was placed before Hon. Justice Boaz Olao on 6th June 2016 who ordered as follows: “*leave not necessary. Just file the application.*” It is pursuant to such a court order that the Plaintiffs’ counsel filed the Notice of Motion dated 8th June 2016. When a court makes an order giving green light to a litigant to file an application, that is sufficient authorization in my view.

16. The second issue is proving contempt of the court order for maintenance of *status quo*. The Defendants’ advocates summarized the critical requirements for contempt of court very well. The court shall adopt and consider the 3 main elements hereunder.

17. The existence of a court order is not disputed. It is also not disputed that it was made with the consent of the parties. What the Defendants are raising is that the order for *status quo* was ambiguous. Granted, it is possible for an order of status quo to be interpreted by different parties in different ways depending on the situation obtaining on the ground at the time such order is made.

18. In this particular case, it is not in dispute that the Plaintiffs were in possession of the subject properties. It would appear from the record that they had been in possession for many years and had actually built some residential structures and cultivated food crops, cash crops and other trees thereon.

19. Looking at the evidence of what happened on the subject properties, that is, destruction of numerous trees and food crops no reasonable person would probably conclude that such actions constituted maintenance of the *status quo*. The felling of trees using powered machinery and destruction of a fence cannot, by any stretch of imagination, be considered the constitute maintenance of status quo unless such action was on going prior to the order of *status quo* being recorded.

20. The court, therefore, finds that in the circumstances of this case, the consent order was sufficiently or reasonably clear on what the Defendants were to refrain from doing.

21. The next element is service of the court order. It is true, as a general rule, that no person should be punished for contempt of court unless the relevant order he is alleged to have disobeyed had been served upon him together with a notice of penal consequences. However, where an order is made by consent or made in the presence of the concerned parties, subsequent service of the order is not mandatory. It is sufficient if it is shown that the Respondent was aware of or had knowledge of the court order.

22. In the case of ***Shimmers Plaza Ltd Vs National Bank of Kenya [2015] eKLR***, the Court of Appeal found the Managing Director of the Respondent guilty of disobedience of an order of “*status quo*” when he sold the subject matter of the appeal before the conclusion of the appeal. The *status quo* order was made in court in the presence of counsel for both the Appellant and the Respondent. The issue of personal service of the order was not upheld.

23. In the circumstances of this case, therefore, I would hold that subsequent service of the consent order was not necessary. The court further holds that the Defendants are deemed to have had knowledge of the consent order which was recorded by their advocates on record. This is a reasonable deduction to make. In any event, the Defendants have not disputed knowledge of the court order despite one of them having sworn a replying affidavit on his own behalf and on behalf of the rest.

24. The third element to be considered is violation or disobedience of the consent order. The court has considered the Plaintiffs’ evidence in support of disobedience of the consent order. There were apparently two reports of malicious damage to property which were made to Runyenjes Police Station. There are photographs showing substantial damage to some trees with several logs lying on the ground. There is also a report from an agricultural extension officer from Kyeni North Agricultural Office on damage to crops and trees.

25. The Defendants have in their replying affidavit stated that the report from the agricultural extension officer is an exaggeration and that the photographs only show one tree having been cut without capturing the person who had actually felled it. The 1st Defendant, however admits having been summoned twice to Runyenjes Police Station to record a statement over his land.

26. In the premises, the court is satisfied that there was destruction of the properties mentioned in the reports to the police and the report of the agricultural extension officer. The photographic evidence is also of persuasive value of the deliberate destruction that was undertaken by the Defendants and their agents. The court further finds that such violation was deliberate and calculated to undermine the consent order and the dignity of the court.

27. It was submitted by the Defendants' counsel that the application for committal of his clients for contempt had been overtaken by events since the Plaintiffs had vacated the suit properties. I do not see how an application for contempt of court can be overtaken by events simply because the Plaintiffs have vacated or been constructively evicted by the Defendants. If the court were to validate such an argument, then all it would require an alleged contemnor to do to scuttle his punishment for contempt would simply be to evict the victim of such violation. This court cannot accept such a proposition.

28. The legal position on a person's obligation to obey a court order is well settled in Kenya. I need not cite the numerous authorities on the matter. The obligation requires a party against who an order is issued to obey it even when they believe it to be irregular, unfair or oppressive, see **Hadkinson Vs Hadkinson [1952] ALL ER 567**. There is an unqualified obligation to obey a court order until it is varied, set aside or recalled.

29. The upshot of the foregoing is that the court is satisfied that the Plaintiffs have established the disobedience of the consent order recorded on 9th December 2015 against the Defendants. The 2nd and 3rd Defendants are the ones who were specifically mentioned in the police reports as having led the hired goons in the destruction of property. The court consequently finds the 2nd and 3rd Defendants guilty of contempt of court.

30. However, before the court can mete out any sanctions for such contempt, the Defendants shall be given an opportunity to be heard in mitigation. The court shall therefore accord them an opportunity to appear in court on 8th May 2017.

31. The Plaintiffs' Notice of Motion dated 8th June 2016 therefore succeeds on the terms and to the extent stated above. The matter shall be listed for mitigation on 8th May 2017 when the 2nd and 3rd Defendants shall be required to attend court personally.

Orders accordingly.

RULING DATED, SIGNED and DELIVERED in open court at EMBU this 19th day of APRIL, 2017

In the presence of Mr Abdi Aziz holding brief for Ms Muthoni Ndeke & Co for the Applicants.

Court clerk Mr Njue

Y.M. ANGIMA

JUDGE

19.04.17