



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET**

**E & L CASE NO. 4 OF 2016**

**ISMAEL TUIYOTT KAITTANY.....1<sup>ST</sup>**  
**PLAINTIFF**

**ELIZABETH JERUTO SUMUKWO.....2<sup>ND</sup>**  
**PLAINTIFF**

**VERSUS**

**JAMES KIMAIYO OREU.....**  
**DEFENDANT**

**RULING**

Ismael Tuiyot Kaittany and Elizabeth Jeruto Oreu hereinafter referred to as the applicants have brought this application dated 13.4.2016 seeking orders that the defendant be committed to prison for such a period as the court shall determine for contempt of court for disobeying the orders of the court issued on 5.4.2016. The applicants further seek for costs of the application.

The application is based on grounds that on the 9<sup>th</sup> March, 2016 the applicant/plaintiff filed an application seeking orders of injunction to stop the defendant/respondent from further encroaching and trespassing on the plaintiff's property. The applicants' application could not proceed on 23<sup>rd</sup> March, 2016 as the court was not sitting. The application was fixed for hearing on 16<sup>th</sup> May, 2016. The defendant then commenced construction of some permanent structures on the property. The applicants then filed a certificate of urgency on 5<sup>th</sup> April, 2016 which was heard ex-parte and the court issued interim orders restraining the defendant/respondent either by himself or through his agents, employee and/or servants from erecting structures, whether temporary or permanent, on the parcel of land known as Sergpot/Koiwoptaoi Block 12 (Katalel)/608 pending the hearing of the application inter partes on 16<sup>th</sup> May, 2016. The orders were extracted and served upon the defendant/respondent on the 7<sup>th</sup> April, 2016 by Patrick G. Ongeri, a process server of High Court of Kenya. The orders were also served on the defendant/respondent's advocates on the 8<sup>th</sup> April, 2016 who acknowledged service by the said Process Server. In spite of the service of the orders and application upon the defendant/respondent personally and also through his advocate, he still went ahead and has continued with the construction of the permanent building on the suit property in utter contravention of the court orders in force with a clear intention of defeating the applicants/plaintiffs' claim thereto. According to the applicant, the aforesaid acts of the respondent/defendant and his agents, servants and/or employees are malicious and contemptuous of the power and authority of the honourable court as the plaintiffs/applicants' property is at risk of being wasted by the respondent/defendant. The respondent is intent on proceeding with the illegal acts unless restrained by this honourable court through exercising its powers to commit the contemnor to prison for blatant disobedience of its orders. The application has been brought in good faith and without undue delay. It is only fair and expedient that the application be allowed.

In the supporting affidavit, the applicant states that on diverse dates between 1994 and 2006, they purchased shares each equivalent to an acre of land from Kipsoen/Kapteren Youth Group. The property was surveyed in the year 2010 and he was allocated a parcel known as Sergioit/Koiwoptaoi Block 12 (Katalel)/608 jointly with the 2<sup>nd</sup> plaintiff who had similarly paid for her share. They were subsequently issued with a joint title deed.

That sometime in April 2015, the defendant without any colour of right or lawful excuse encroached onto their property and fenced off the whole parcel claiming to be his. He also ploughed it without their authority. That they filed an application dated 9<sup>th</sup> March, 2016 seeking interim injunctive orders. The same was slated for hearing on 23<sup>rd</sup> March, 2016 when however, the court was engaged in other official duties. The said application is now set for hearing on 16<sup>th</sup> May, 2016. That it came to his attention that the defendant had commenced constructing a permanent building on the suit property.

That they immediately notified their advocate, Mr. Magut who filed a Certificate of urgency on 5<sup>th</sup> April, 2016. The court then issued interim orders stopping further construction on the said parcel pending the hearing of the application in Mya, 2016. The orders and the application were served on the respondent personally on 7<sup>th</sup> April, 2016 and also his advocate who duly acknowledged service. That in spite of service of the court orders, the defendant/respondent has gone ahead with the construction unperturbed.

That he verily believes that the aforesaid acts by the respondent and his agents, servants and/or employees are malicious and contemptuous of the power and authority of this honourable court. The respondent is intent on proceeding with his illegal acts unless restrained by this honourable court through exercise of its power to commit him to prison for disobedience of orders. That no lawful justification exists for the respondents to act as they have done. That it is thus and expedient that the orders sought be granted to assert the authority of the court and ensure that the respondent takes court orders seriously. That the application is brought in good faith and without undue delay. That he therefore pray that the application be allowed as drawn.

James Kimaiyo Oreu, the alleged contemnor states that it is not true that the applicants purchased shares between 1994 and 2006 from Kipsoen/Kapteren Youth Group and that it is not true that Sergoit/Koiwoptaoi Block 12(Katalel)/608 was surveyed in the year 2006 to his knowledge as the same was done secretly by the officials of the farm in collusion with the plaintiffs with the intent of depriving him of his land. He denies having commenced construction and states that there is a construction on the parcel which belongs to his son Lt. Cornelius Maiyo. That his son had begun construction way back in 2015 before the instant suit. He claims that the photographs annexed to the supporting affidavits are photographs taken way back when the building had commenced. That he has not disobeyed the court order as he has advised his son to stop the construction process. That his Advocate, Miss T. Tum further advised him to stop from carrying out any construction work on the disputed site.

I have considered the application, supporting affidavit and the replying affidavit and do find that though it has been demonstrated that the defendant was served and therefore, was aware of the court orders, it is not clear whether the foundation and walls of the building were constructed after the court order was issued as it is not clear when the photos annexed in the affidavit of Ismael Tuiyott Kaityany sworn on 4.4.2016 and the photos annexed in the affidavit sworn on 8.4.2016 were taken.

It is trite law that the burden of proof in contempt matter is slightly above ***“balance of probabilities”*** but below beyond reasonable doubt. I do find that the plaintiff has not demonstrated that the walls were constructed after the court order was issued and therefore the application fails.

**DATED AND DELIVERED AT ELDORET THIS 13<sup>TH</sup> DAY OF APRIL, 2017.**

**A. OMBWAYO**

**JUDGE**