



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 18 OF 2017

RICHARD KHAMALA WAFULA.....PLAINTIFF

VERSUS

DISMAS WAFULA..... 1ST DEFENDANT

BENARD WAFULA..... 2ND DEFENDANT

R U L I N G

1. The plaintiff filed an application dated 6th March, 2017. In that application he sought the following orders:-

(a)(spent)

(b) That this court be pleased to cite the 1st Respondent herein for contempt of orders granted on 21/2/2017.

(c) That the 1st Respondent be committed to civil jail for a term not exceeding 6 months for disobeying orders granted on 21/2/2017.

(d) That costs of this application be borne by the Respondent.

2. The plaintiff states in his grounds in support of the application that the 1st respondent was in court on the 21/2/2017 when the court issued orders restraining him from interfering with the applicant's land; that the orders were explained to the 1st respondent and that on 27/2/2017 the 1st respondent disobeyed the court orders of 21/2/2017 by leasing out the applicant's land to third parties.

3. In his affidavit the applicant reiterates the grounds above. He also avers that the respondents leased part of the applicants land to a third party. Exhibits RKW1 (a) and RKW1 (b) are attached to the supporting affidavit. Exhibit RKW1 (a) is a copy of an agreement written down in the Swahili language. It is dated 22/1/2017. It shows record of a transaction in which one Dismas Sifuna Wafula, Bernard Wekesa Mandila and Abraham Wafula as lessors who have leased the land out. It is not stated expressly in the body of the agreement where the land is located. However the address at the top right hand corner states "Gidea Farm Plot 86 P.O. Box 1278 Kitale". It seems to describe the land as 10 acres. There is a list of witnesses at the bottom of the agreement. However, the purported lessee is not mentioned by name. Only an Identity Card Number is given, against which there is a signature. Exhibit RKW1(b) is a "lease agreement" dated 28/2/2017 in respect of "Gidea Farm Plot 86" in which a "Dismas Sifuna Wafula" and a "Bernard Wekesa" have leased out a land parcel measuring 1.8 acres, the lessee appearing to the one "Abraham Wafula"

4. Contempt proceedings are serious in nature in that a man may be sent to jail as a consequence thereof. Proof of disobedience and intention to disobey are therefore mandatory ingredients of the offence of contempt of court orders. It must therefore be proved in an application of this kind that the alleged contemnor had knowledge of the order and that he deliberately disobeyed the said order while having such knowledge.

5. The orders of this court given on 21/2/2017 were clear and unambiguous. By those orders the respondents and their agents were restrained from entering, constructing on, claiming or in any other way using the 5 acres belonging to the applicant situated on Plot Number 86 Gidea Settlement Scheme until the hearing and determination of this suit.

6. The two exhibits that the court considers as relevant to the theme of willful disobedience of the court orders of 21/2/2017 are RKW1 (a) and RKW1 (b). However RKW1 (a) is dated 22/1/2017, a date prior to the issuance of the orders of 21/2/2017. It has not been pleaded that this date was an error. The document appears to have been made earlier than the date of the court orders of 21/2/2017. It should not be considered in relation to this application to cite the 1st respondent for contempt.

7. However the second document headed "lease agreement" is dated 25/2/2017 or 28/2/2017. The date is not clear owing to the author's loopy handwriting. The two dates however, whichever eventually happens to be the correct one, come after the date of the court orders of 21/2/2017. Is that sufficient proof of the 1st respondent's culpability?

8. In the court's consideration a copy of a document by itself, though attached to a sworn affidavit is of very little help in the quest for the truth of the culpability of any person in respect of anything he is accused of. Blind reliance on documents may lead to serious errors where the veracity of the narrative they contain is not tested by cross examination or by document examination.

9. In the current application the exhibited document marked RKW 1(b) is handwritten. There is no proof that it was written by the 1st respondent or at his instance or that it was signed by him. There is no evidence that he received the monies stated in the document as consideration. In brief, in the absence of an admission either by the 1st respondent or any of the parties named therein that the document describes true state of affairs, this court only has the applicant's word.

10. The next appropriate recourse that may help the applicant's case is to examine the statements in the supporting affidavit for any averments that may aid the court in connecting the 1st respondent to the said document exhibit RKW1 (b). One would have expected factual statements exhibiting first hand knowledge in the supporting affidavit, sufficient to corroborate the contents of the document RKW1 (b). Those factual statements should otherwise connect the document directly to the 1st respondent's alleged conduct of disobedience of a court order.

11. Unfortunately the only statements that the court finds relevant are contained in the paragraphs 8, 9, 10, 12 and 13 of the supporting affidavit of Richard Khamala Wafula, the applicant. They read as follows:-

"8. That with sheer disrespect on 27/2/2017 the respondents leased part of my portion to a 3rd party (see copy marked RKW1 (a), (b)).

9. That to add insult to injury, I had leased out my land to a 3rd party who had ploughed the land (see copy marked RKW2 (a), (b)).

10. That the 1st respondent even demolished my house that stood in my land (see copy marked RKW3)

11..... (not relevant)

12. That the respondents also received proceeds of ploughed land action done by my agent.

13. That a close look at the annexures the (sic) respondents now are claiming to own 10 acres”.

12. The applicant does not provide details in his statements as to how he obtained the documents that he exhibits as RKW1 (a) and RKW1 (b). It must be said here that in an application seeking to cite another party for contempt, mere conclusory statements like those contained in paragraphs 8, 9, 10, 12 and 13 of the affidavit of the applicant will not aid the court in doing justice to any of the parties. It would have been of very great help if the statements exhibited more knowledge about the source of the documents and the truth of their contents. In the absence of this it may be a grave error to convict an alleged contemnor.

13. The situation is exacerbated by the applicant's reliance on the presence of the 1st respondent in court at the delivery of the Ruling on 21/2/2017. For that reason, he appears to argue, there was no need to serve the order and the penal notice upon the 1st respondent personally.

14. It is true that knowledge can be imputed from a set of circumstances, for example presence of an advocate or a party in court at the time the court issues its orders. However, it costs little to ensure that the processed and sealed order is served upon a party, who would then find it hard to wiggle out of the applicant's trap when an affidavit of service confirms beyond doubt that he was served, in which case his knowledge of the contents of such order in subsequent contempt proceedings will be not be merely imputed but real.

15. In the current application no service is alleged hence no affidavit of service is filed. The court is compelled to rely on the 1st respondent's adversary's affidavit in deciding whether to convict 1st respondent, which is, in itself, though a normal practice, one which ought to be exercised with the optimum caution to avoid abuse of the court process especially if the alleged contemnor is unrepresented.

16. Therefore when a deponent like the present applicant omits, whether by design or by default to include the sources of his information and documentary evidence in his depositions in an affidavit supporting an application seeking to cite a person for contempt of court, it is not an outcome worthy of any surprise if the court, disadvantaged as it is in the circumstances finds that no contempt was proved against the respondent.

17. The applicant's case is not the only one in which such an affidavit has been used. Of late this court has witnessed, one after another, affidavits - some only one page long inclusive of the heading, title and jurat- supporting applications for orders having the potential of far reaching consequences, which affidavits rank far below the standard of the current applicant's. It must be made clear to practitioners that such affidavits not only harm the prospects of their clients' cases but also exert considerable strain on the court, which, though it may be convinced that there may have been a good ground for the application, powerlessly subjects its determination to only what has been expressed or exhibited in those affidavits.

18. In conclusion, I find that the applicant's application dated 6th March, 2017 is not supported by adequate evidence. The same is hereby dismissed. There shall be no orders as to costs.

Signed, dated and delivered at Kitale on this 11th day of **April, 2017.**

MWANGI NJOROGE

JUDGE

In the presence of:

Mr. Wafula for the Applicant

N/A for the Respondent

Court Assistant - Isabellah.

MWANGI NJOROGE

JUDGE

11/4/2017