



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 525 OF 2017

(formerly Milimani Land Suit No. 277 of 2015)

ROBINS NYANGAU MOSONGO.....1ST PLAINTIFF/APPLICANT

TABITHA MBUTE LAVI.....2ND PLAINTIFF/APPLICANT

VERSUS

NGOITO LEIYAN.....1ST DEFENDANT/RESPONDENT

KAJIADO COUNTY GOVERNMENT (SUCCESSOR TO COUNTY

COUNCIL OF OL KEJUADO.....2ND DEFENDANT/ RESPONDENT

RULING

The application before this court is a notice of motion application dated the 1st March, 2017 brought pursuant to Order 40 Rules 3 and Order 51 Rule 1 of the Civil Procedure Rules, and Section 3, 3A & 63 of the Civil Procedure Act, and all other relevant and enabling provisions of the Law. The 1st & 2nd Plaintiff /Applicants seek the following prayers:

1. Spent
2. That the Honourable Court do issue an arrest warrant against the 1st Defendant/Respondent for being in contempt of court orders that were issued by this Honourable Court.
3. That the 1st Defendant/Respondent be ordered to pay costs of the application.

The application is based on the following grounds, which in summary are that the 1st and 2nd Plaintiffs/Applicants brought an application dated 7th April, 2015 in respect of suit property described as Plot No. 522/RESIDENTIAL - BULBUL T. CENTRE and Justice Onguto allowed prayer numbers 3 and 5 of the said application. Justice Onguto delivered the ruling in the presence of Ms Badia for the Plaintiffs/Applicants and Ms Nzioki holding brief for Mr. Bosire advocate for the 1st Defendant/Respondent. Further, that despite the aforementioned express orders, on or about November 2016 the 1st Defendant constructed or caused to construct an iron sheet structure on the 1st Plaintiff/Applicant's piece of land. On 28th February, 2017 the 1st Plaintiff/Applicant discovered that the 1st Defendant/Respondent had completely taken down his fence and used the wooden post therefrom as firewood. The 1st Defendant/Respondent has refused, neglected and/or failed to comply with the court orders and he continues to act in blatant disregard of the same.

The application is supported by the affidavit of ROBINS NYANGAU MOSONGO who is the 1st Plaintiff/Applicant herein. He avers that he is the owner of property known as 522/RESIDENTIAL - BULBUL T. CENTRE and that towards end of November, 2016 the 1st Defendant/Respondent constructed or caused to be constructed an iron sheet structure on his property which he is using as a makeshift hotel, despite orders from Court restraining him from doing so. Further that on 13th January, 2017 his advocate sent the 1st Defendant/Respondent's advocate a letter warning them of pre emptive contempt proceedings. Further that on 28th February, 2017 he discovered that the 1st Defendant/Respondent had completely taken down the fence of the suit property and was using the wooden posts from his fence as firewood. He deposes that he has not allowed anyone including the 1st Defendant/Respondent herein to enter into his suit property and commit thereon anything whatsoever and that the suit property is likely to waste.

On the 11th April, 2017 the application proceeded unopposed as the Respondents had been served as indicated in the affidavit of service, but they did not attend Court.

Ms Badia who was Counsel for the Plaintiffs/Applicants highlighted the facts of the case and submitted that the 1st Defendant/Respondent was in contempt of court as he trespassed and interfered with the suit property that belonged to the 1st Plaintiff, despite the existence of a

court order. She submitted that there are three elements that must be proved for contempt proceedings:

- a) Applicant must demonstrate terms of orders
- b) Applicant must demonstrate knowledge of terms by respondent
- c) Applicant must demonstrate failure of respondent to comply with court order

She further submitted that they had proved all the three elements of contempt proceedings and annexed a copy of the ruling dated 24th April, 2015 which was erroneously dated as 4th April, 2015. She relied on several cases including **North Tetu Farmers Co. Ltd v. Joseph Nderitu Wanjohi (2016) eKLR** where Justice Mativo stated that: '**writing on proving the elements of civil contempt, learned authors of the book Contempt in Modern New Zealand have authoritatively stated as follows:-**

'there are essentially four elements that must be proved to make the case for civil contempt. The applicant must prove to the required standard (in civil contempt cases which is higher than civil cases - (a) the terms of the order (or injunction or undertaking) were clear and unambiguous and were binding on the defendant; (b) the defendant had knowledge of or proper notice of the terms of the order; (c) the defendant has acted in breach of the terms of the order; and (d) the defendant's conduct was deliberate.'

Issues and Determination

Upon perusal of the application filed herein with the supporting affidavit including the annexures thereon, the Court notes that the issue for determination is whether the 1st Defendant/Respondent is in contempt of a court order or not.

Black's Law Dictionary defines contempt as follows: '**Contempt is a disregard of, disobedience to, the rules orders of a legislative or judicial body, or an interruption of its proceedings by disorderly behaviour or insolent language, in its presence or so near thereto as to disturb the proceedings or to impair the respect due to such a body.'**

The 1st Plaintiff/Applicant has strived to ensure that he proves the elements of contempt committed by the 1st Defendant/Respondent.

First, the 1st Defendant /Respondent had an advocate Mrs. Nzioki who held brief for Mr. Bosire at the time the ruling was delivered by Justice Onguto. The Orders granted on 24th April, 2015 which was erroneously indicated as 4th April, 2015 barred the 1st defendant/respondent from interfering with the suit parcel that was owned by the 1st Plaintiff. The 1st Defendant was hence well aware of the order granted against him.

Secondly, despite the order of the court as evidenced at exhibit 'RNM2' in the supporting affidavit, the 1st Defendant/Respondent proceeded to interfere with the suit parcel, damage the fence and use the same as firewood. The 1st Plaintiff's Counsel sent him a letter warning him of commencement of contempt proceedings but he persisted in disobeying the court order.

Court orders are sacrosanct and should be obeyed. Any party that feels aggrieved from an order of the court has a remedy of filing for review and or appeal against the said order. In the instant motion, the 1st Defendant/Respondent never filed an affidavit to oppose the contempt proceedings against him and neither appeared in court to defend himself.

Section 63 of the Civil Procedure Act stipulates as follows: '**in order to prevent the ends of justice from being defeated the court may, if it so prescribes ; (c) grant a temporary injunction and in case of disobedience commit the person guilty thereof to prison and that his property be attached.'**

Contempt proceedings though civil in nature are serious allegations and it is in the interest of justice and pertinent for the alleged contemnor to be granted an opportunity to be heard. In the circumstances herein, the Court finds the Applicant's contempt proceedings are merited and notes on 24th April, 2015 Justice Onguto had already granted an order that the 1st Defendant/Respondent do immediately vacate, the 1st Plaintiff/Applicant's suit property known as 522/RESIDENTIAL - BULBUL.T.CENTRE and failure of which he be forcefully evicted therefrom. It is in respect of the aforesaid Court Order dated 24th April, 2015 that I make an order that warrant of eviction be and is hereby issued against the Defendant/Respondent failure of which a warrant of arrest will issue to produce the 1st Defendant in Court.

Costs will be in the cause.

Dated signed and delivered in open court at Kajiado this 28th day of June, 2017

CHRISTINE OCHIENG

JUDGE