



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT OF KENYA**  
**AT NAKURU**  
**ELC NO.267 OF 2015**  
**KIBIRI FARRO NDIRANGU.....PLAINTIFF**  
**VERSUS**  
**JOSEPH MWANGI KIARIE.....DEFENDANT**

**RULING**

***(Application to punish respondent for disobedience of an order of injunction; interim order of injunction issued; order lapsing for want of extension; application filed about 7 months after interim order lapsed; standards of proof in an application of this nature; no proof of the dates that the respondent is said to have interfered with the suit land so that it can be determined if it fell during the subsistence of the interim order or not; application dismissed)***

1. The application before me is that dated 10 August 2016 filed by the plaintiff. He has asked for orders that the defendant/ respondent be summoned to show cause why he has disobeyed the orders issued on 24 September 2015, and upon his appearance, that he be committed to jail for 6 months for contempt of court and/or breach of an injunction.

2. By way of background, the applicant commenced this suit on 23 September 2015. In his plaint, he pleaded that he is the registered owner of the land parcel Nakuru Municipality Block 1/152 (Langalanga). He pleaded that through fraud, and in concert with the Nakuru County Land Registry, the respondent procured another title in his name and proceeded to commence construction on the suit land. In the suit, the applicant asked for orders inter alia to revoke the entry of the respondent as proprietor and for the register to be rectified to reflect that the plaintiff is the owner of the suit land.

3. Together with the plaint, the plaintiff filed an application under Order 40 Rule 1, 2 and 3 of the Civil Procedure Rules. The application sought the following orders :-

(i) Certification of urgency.

(ii) That pending the hearing of this application inter partes, this court issues an order in rem restraining the defendant, his agents, servants, employees or any person claiming to have acquired title to the parcel of land known as Nakuru Municipality Block 1/152 (Langalanga) through the defendant's illegal process from selling, transferring, entering upon, construction or in any way changing the character or registration status of the parcel of land herein.

(iii) That pending the hearing and determination of this suit, this court issues an order in rem restraining the defendant, his agents, servants, employees or any person claiming to have acquired

title to the parcel of land known as Nakuru Municipality Block 1/152 (Langalanga) through the defendant's illegal process from selling, transferring, entering upon, construction or in any way changing the character or registration status of the parcel of land herein.

(iv) That costs of this application be borne by the respondent.

4. The application came before me, ex-parte in the first instance, on 24 September 2015. I allowed prayer (ii) of the application as drawn and directed that the orders remain in place until 2 November 2015 when the matter would be heard inter partes.

5. On 2 November 2015, counsel for the applicant and respondent stated that they are negotiating and asked for a mention date. I recorded that since the parties are negotiating, the matter be mentioned on 14 March 2015 and extended the interim orders. The matter was mentioned before the Deputy Registrar on 14 March 2016 but there was no appearance by either party and the case was stood over generally. The matter lay quiet until this application was filed on 10 August 2016.

6. In the affidavit in support of this application, the applicant has averred that despite the order of 24 September 2015, the respondent entered the suit land and has continued to be on the land, fenced it off and cultivated maize thereof. Some photographs are annexed.

7. The respondent did not reply to the application and the only material that I have is that presented by the applicant. That does not however mean that the application must be automatically allowed.

8. I do note that this application has been brought pursuant to the provisions of Order 40 Rule 3 of the Civil Procedure Rules, which is drawn as follows :-

### **3. Consequence of breach [Order 40, rule 3.]**

*(1) In cases of disobedience, or of breach of any such terms, the court granting an injunction may order the property of the person guilty of such disobedience or breach to be attached, and may also order such person to be detained in prison for a term not exceeding six months unless in the meantime the court directs his release.*

*(2) No attachment under this rule shall remain in force for more than one year, at the end of which time, if the disobedience or breach continues, the property attached may be sold, and out of the proceeds the court may award such compensation as it thinks fit, and shall pay the balance, if any, to the party entitled thereto.*

*(3) An application under this rule shall be made by notice of motion in the same suit.*

9. It will be discerned from the above that the court has power to punish for disobedience of an order of injunction. 10. There was indeed an order of injunction issued on 24 September 2015. However, that order lapsed on 14 March 2016 for it was an interim order which was never extended on that day. So far, the substantive application for injunction is yet to be heard.

11. I note that this application was filed on 10 August 2016, which is about 7 months after the interim order of injunction lapsed. It has been alleged in this application that the respondent has disobeyed the order issued on 24 September 2015 by entering the land, fencing it, and cultivating it. Given that the interim order of injunction complained of does not subsist any more, for it lapsed, it was incumbent upon the applicant to demonstrate that the acts complained of, as comprising acts of disobedience, took place when the interim order of injunction was still in force. The supporting affidavit to this application does not state the precise dates when the respondent entered the suit land, when he fenced it, or when he cultivated maize on it. These were critical facts that needed to be supplied so as to support the application.

12. An application for contempt, if allowed, may result in the liberty of the respondent being curtailed. The standard of proof is therefore higher than on a balance of probabilities. I can do no better than cite the

decision of the Court of Appeal in the case of *Mutitika vs Baharini Farms Limited (1985) KLR 227* where the Court stated as follows at page 224 :-

*"In our view the standard of proof in contempt proceedings must be higher than proof on a balance of probabilities, almost but not exactly, beyond reasonable doubt."*

13. Given the gaps that I have pointed out in the application herein, I am not persuaded that the above test has been met by the applicant.

14. It was argued by Mr. Githui for the applicant, that since the respondent has not replied to the application, then Order 2 Rule 11 of the Civil Procedure Rules applies. The said provision was cited to argue that facts which are not disputed are deemed admitted. With respect, I am afraid that Order 2 Rule 11 does not apply in the circumstances herein. Order 2 relates to pleadings generally. Pleadings are defined in Section 2 of the Civil Procedure Act, Cap 21, Laws of Kenya, as follows :-

*“pleading” includes a petition or summons, and the statements in writing of the claim or demand of any plaintiff, and of the defence of any defendant thereto, and of the reply of the plaintiff to any defence or counterclaim of a defendant;*

Order 2 rule 11 which was sought to be relied on states as follows :-

**11. Admissions and denials [Order 2, rule 11.]**

*(1) Subject to subrule (4), any allegation of fact made by a party in his pleading shall be deemed to be admitted by the opposing party unless it is traversed by that party in his pleading or a joinder of issue under r. 10 operates as a denial of it.*

*(2) A traverse may be made either by denial or by a statement of non-admission and either expressly or by necessary implication.*

*(3) Subject to subrule (4), every allegation of fact made in a plaint or counterclaim which the party on whom it is served does not intend to admit shall be specifically traversed by him in his defence or defence to counterclaim; and a general denial of such allegations, or a general statement of non admission of them, shall not be a sufficient traverse of them.*

*(4) Any allegation that a party has suffered damage and any allegation as to the amount of damages shall be deemed to have been traversed unless specifically admitted.*

15. Order 2 rule 11, above, cannot apply since what I have before me is not a pleading as defined by Section 2 of the Civil Procedure Act. An application of the nature that is before me does not, by any stretch of imagination, qualify to be a pleading. It is therefore immaterial that the respondent has not replied to it. The position that I have is almost akin to that where an accused person in a criminal case decides to keep silent. The fact that he has kept silent does not mean that he admits the charge and it does not mean that he is guilty of the offence charged. The burden of proof is still upon the prosecution to prove his guilt. In the instance of this application, the applicant bore the burden of proving, to the required standard, that the respondent has disobeyed the order of 24 September 2015 and it matters not that there is no response to the application. That burden of proof never shifted to the respondent.

16. I have already mentioned that I am not persuaded that the applicant has met the standard of proof to succeed in an application of this nature and I have pointed out the gaps in his application that lead me to that conclusion. I therefore proceed to dismiss this application. However, I make no orders as to costs since the respondent did not deem it important to oppose the motion.

17. It is so ordered.

**Dated, signed and delivered in open court at Nakuru this 22<sup>nd</sup> day of June 2017.**

**MUNYAO SILA**

**JUDGE**

**ENVIRONMENT & LAND COURT AT NAKURU**

**In presence of: -**

Mr. Kambo holding brief for Mr. Githui for the plaintiff/applicant

Ms. Njeri Muiruri for the defendant/respondent

Court Assistant: Nelima

**MUNYAO SILA**

**JUDGE**

**ENVIRONMENT & LAND COURT AT NAKURU**