



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS**

**CIVIL APPEAL NO. 1 OF 2015**

MUTEMI NJERU .....1<sup>ST</sup> APPLICANT

NTHIGA NJERU .....2<sup>ND</sup> APPLICANT

MURYUNGI NYAGA .....3<sup>RD</sup> APPLICANT

**VERSUS**

NGARI NYAGAH .....RESPONDENT

**RULING**

1. In the Application dated 25<sup>th</sup> September, 2015, the Appellants are seeking for the following orders:
  - a. That leave do issue to the Applicants to apply for orders of committal as against the Respondent for disobeying the orders of this Honourable Court given on 23<sup>rd</sup> April, 2015.*
  - b. That upon granting of prayer 2 and 3 above, an order do issue requiring the Respondent to show cause why he should not [be] committed to civil jail for being in contempt of this court orders issued on 23<sup>rd</sup> April, 2015.*
  - c. That the Respondent be committed to civil jail for such periods of this Honourable Court may deem fit.*
  - d. That costs of this Application be paid by the Defendant/Respondent.*
2. The Application is supported by the Affidavit of the 1<sup>st</sup> Applicant who has deponed that on 23<sup>rd</sup> April, 2015, this court granted orders of stay of execution of the lower court decree and Judgment in Kyuso PMCC No. 39 of 2011 pending the hearing of the Application dated 21<sup>st</sup> April, 2015.
3. According to the Applicants, on 23<sup>rd</sup> May, 2015, the Respondent entered into their portions of land and started clearing the same for cultivation; that while armed with a panga, the Respondent chased the 1<sup>st</sup> Applicant with his sons from the land and that the actions of the Respondent are disrespectful of the orders of this court.
4. In response, the Respondent deponed that the Application is defective because the Applicants have not complied with the requisite procedure for instituting contempt proceedings against the Respondent; that the order of this court only stayed the execution of the lower court Judgment and that the Affidavit of the process-server does not specify how he identified him.

5. The Respondent further deponed that he was declared the rightful owner of the suit land by the lower court and that the lower court restrained the Applicants from trespassing or interfering with his quiet enjoyment of the suit land.
6. In his submissions, the Applicants' advocate abandoned several prayers, including the prayer seeking for leave to commence contempt proceedings.
7. Counsel submitted that the requirement that an Applicant must seek leave before commencing contempt proceedings has long been dispensed with.
8. The Applicants' advocate submitted that the Respondent was personally served with the order of 23<sup>rd</sup> April, 2015; that on 25<sup>th</sup> May, 2015, the Respondent illegally entered the Applicants' portion of land and started clearing it and that on 29<sup>th</sup> September, 2015, the Respondent entered the 1<sup>st</sup> Applicant's land and caused disturbance while armed with a panga.
9. In his submissions, the Respondent's advocate submitted that the Applicants were supposed to fulfill the requisite conditions for contempt of court; that there was no personal service of the impugned order on the Respondent and that as per the order of this court, the Respondent was only restrained from declaring himself as the owner of the disputed parcel of land.
10. The Application before me has been filed pursuant to the provisions of Section 5 of the Judicature Act. This provision subjects the proceedings of contempt of court to the law governing the High court of justice in England, which used to be Order 52 of the Supreme Court Rules.
11. However, England enacted the Contempt of Court Act of 1981 and Part 81 of the procedure in the Civil Procedure (Amendment No.2) Rules, 2012. That is the applicable law in Kenya (*See Justus Kariuki Mate & Another vs. Hon. Martin Nyanga Wambora & Another, Civil Appeal No. 24 of 2014 and Christine Wangari Gachege Vs Elizabeth Wanjiru Evans & 11 others – Civil Application No. 233 of 2007*).
12. The law pertaining to a breach of a Judgment, order or undertaking to do or abstain from doing an act is provided for under Rule 81.11.
13. As a general rule, under Rule 81.6, all service under this breach ought to be personal service unless the court dispenses with the personal service under Rule 81.8.
14. The law relating to obtaining leave before commencing contempt proceedings has been dispensed with under the new provisions. Consequently, the Respondent's contention that the Applicants should have obtained leave before commencing the current proceedings cannot hold.
15. It is not in dispute that on 8<sup>th</sup> February, 2015, the Principal Magistrate in Kyuso Civil Case No. 39 of 2011 decreed that the Respondent was the rightful owner of all the unsurveyed land situated at Kavogo village within Kitui County. The court further restrained the Applicants herein from trespassing or interfering with the Respondent's quiet possession or dealing in any way with the suit land.
16. On 23<sup>rd</sup> April, 2015, this court made an order staying the execution of the lower court decree and Judgment pending the hearing and determination of the Application.
17. The process-server has filed an Affidavit of Service in which he has deponed that he served the Respondent with the order of 23<sup>rd</sup> April, 2015 on 7<sup>th</sup> May, 2015. The process-server has further deponed that he knew the Respondent as at the time of service.
18. The Respondent herein did not apply to this court for summons to issue for purposes of cross-examining the process server on the contents of his Affidavit.

19. Having not denied that indeed his home is in Syokereke Sub-Location, Kitui County, and that he was at home on 7<sup>th</sup> May, 2015 at 4.58pm, I find that he was indeed served with the order of this court.
20. I have read the Application that gave rise to the ex-parte order of this court. I have also read the pleadings that were filed in the lower court.
21. From the said pleadings, it would appear that the parties are related, and the dispute is in respect of ancestral land.
22. Although the lower court decreed that the suit land belongs to the Respondent, that order was stayed by this court.
23. Consequently, until the Application for stay of execution is heard and determined, the Respondent cannot purport to execute the lower court's decree by trespassing on the suit land.
24. Although the Applicants have alleged that the Respondent trespassed on the suit land, and that he chased them from the suit land, there is no evidence before me to show that indeed the impugned acts of trespass occurred.
25. Having failed to take photographs of the Respondent's acts of trespass, I decline to allow the Application dated 27<sup>th</sup> September, 2015.
26. In the circumstances, I dismiss the Application dated 25<sup>th</sup> September, 2015.
27. Each party shall bear his own courts.

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 16<sup>TH</sup> DAY OF JUNE, 2017.**

**O.A. ANGOTE**

**JUDGE**