



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT

AT NYAHURURU

ELC CASE NO 316 OF 2017

MURUAKI FARMERS CO-OPERATIVE SOCIETY.....PLAINTIFF

VERSUS

MWANGI NJOROGE MWANGI.....DEFENDANT

RULING

1. Before me for determination is the Notice of Motion dated 26th October 2015 brought under *Order 40 Rule 3(1) and (3), of the Civil Procedure Rules* where the Applicant seeks that:

a) The respondent herein be detained in prison for a term not exceeding six months for disobeying the court orders granted on 18th March 2012, barring him for using land parcel No. Nyandarua/Muruaki/5435 pending the hearing and determination of the suit herein.

b) That costs of this application be paid by the Defendants/Respondents.

The Application was premised on the grounds that:

i. The Defendant/ Respondent had continued to plough, plant and use the plaintiff's land contrary to the court's orders.

ii. The Defendant/ Respondent's continued use of the plaintiff's land is being in contempt of court.

iii. That the Defendant/ Respondent's continued disobedience of the court's orders is likely to bring dispute and ridicule of this honorable court.

2. The Application was further supported by an affidavit sworn by Mr. Peter Mathenge Mucura the chairman of the Plaintiff/Applicant.

3. In his supporting affidavit, Peter Mathenge Mucura deposes that on 18th May 2012 this court issued an order of injunction restraining the Defendants, his servants or employees from cultivating or in any way using the plaintiff's land parcel No. Nyandarua/Muruaki/5435 pending the hearing and determination of the suit herein.

4. A copy of the said order was extracted and served upon the Defendant on the 30th October 2012.

5. Peter Mathenge Mucura further deposes that the defendant was aware of the said order but on various occasions has chosen to disobey the same

6. That via an application dated the 27th November 2012 the Applicant had sought orders against the Defendant for contempt of court which were served against him with a hearing date of 9th January 2013.

7. That the said application was heard and allowed on the 9th January 2013 wherein a warrant of arrest was issued against the Defendant for committal to civil jail.

8. That on the 26th March 2013 the defendant was brought before court wherein he promised to remove his crops by 30th June 2013 which court issued the same order.

9. That up to the time the application was filed the defendant has refused to remove his crops and continues to cultivate and plant crops on the said land defying court orders.
10. He annexed copies of the order dated 18th May 2012 as well as an affidavit of service showing that there was personal service of the order and penal notice upon the contemnor on 30th October 2012 at 10:01am in the presence of one Mr. William Murage.
11. The Plaintiff/ Applicant therefore urged this court to punish the Defendant/Respondent for disobeying the court order issued on the 18th May 2012.
12. When counsel for the Defendant/Respondent appeared before on the 19th June 2017, the court was informed that the application dated 26th October 2015, had been served upon the defendant and an affidavit of service filed thereafter.
13. The Defendant/Respondent had filed their response on the 12th January 2016 and despite service of the hearing date, failed to appear in court on the date scheduled for hearing of this application. The court having satisfied itself that service was properly effected, proceeded to hear Counsel for the Applicant ex-parte on his application.
14. I have heard submission by counsel for the Applicant and perused the court's proceedings for which I find that on the 2nd November 2015 this application was placed before my brother Justice Munyao who directed that the same be served upon the Defendant for inter-parte hearing which was scheduled for the 21st January 2016.
15. On the said date, parties recorded a consent which was adopted, to the effect that the land Registrar- Nyandarua do visit the suit land to establish the boundaries between lands parcels No. Nyandarua/ Muruati 2747, 2748 and 5435 so as to give a report on which party had encroached on the other's piece of land. The cost of this exercise was to be shared between the parties.
16. On the 20th May 2016, following the reports dated 8th May 2016, and 10th May 2016, submissions in court were to the effect that the land surveyor could not access the suit land as the defendant and his sons had become hostile towards them thereby disrupting their work.
17. The court then directed that there be a second visit to the suit land by the surveyor but this time under police escort. Costs were to be shouldered by the Defendant.
18. On 17th October 2016 when the parties were before court, Justice Munyao was informed that the report had been filed. The matter was subsequently given a mention date for the 2nd November 2016 for fixing of a hearing date for the hearing of this application. The Respondent's counsel was granted leave to seek further instructions from his client on the report.
19. Came the 2nd November 2016 and the court was informed that the defendant had refused to pay the surveyor's cost as ordered by the court and had even demolished a cattle dip on the plaintiff's property despite a court order being in force.
20. The court then directed that this application be heard on the 9th February 2017 and further that the defendant would have to convince the court that he had a right of audience since he had not paid his share of the surveyor's cost as ordered.
21. The matter was subsequently transferred to this court and a hearing date taken in the registry by the Applicant who effected service upon the Defendant who then chose not to appear in court to show cause why he should not be committed to civil jail for continued disobedience of the court orders of 18th March 2012. The court also noted that the surveyor's fee had still not been paid by the defendant.
22. I have carefully considered the application before court, and the submissions by the applicants' counsel on his application. I have also perused and considered the proceedings herein as well as the Land Registrar and the surveyor's reports.
23. The reports dated 14th October 2016 and 14th October 2016 respectively, confirm that indeed the defendant has encroached into the plaintiff's piece of land by 0.6 hectares.
24. I have also considered the applicable procedural law under order 40 Rule 3(1) of the Civil Procedure Rules which enacts that:-

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.

25. In the Scottish case of **Stewart Robertson vs. Her Majesty's Advocate, 2007 HCAC63**, Lord Justice Clerk stated that:

“ contempt of court is constituted by conduct that denotes willful defiance of or disrespect towards the court or that willfully challenges or affronts the authority of the court or the supremacy of the law, whether in civil or criminal proceedings”

26. Further, Romer L.J in Hadkinson vs. Hadkinson(1952) ALL ER 567 stated that:

“It is the plain and unqualified obligation of every person, against, or in respect of, whom an order is made by a court of competent jurisdiction to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact

that it extends even to cases where the person affected by an order believes it to be irregular or even void”

27. I find that the defendant in the present case has on several occasions defied orders of the court despite personal service of the order and penal notice upon him. The action of the defendant’s continued use of the applicant’s land ran afoul of the terms of the court orders issued on the 18th March 2012 which had restrained him, his servants or employees from cultivating or in any way using the plaintiff’s land parcel No. Nyandarua/Muruaki/5435 pending the hearing and determination of the suit herein.

28. To protect the dignity and authority of the court of law, this court, shall be firm on any person who deliberately disobeys court orders or attempts to scuttle the court process.

29. I find that the defendant herein is in contempt of court orders and proceed to punish him for contempt. The application is herein allowed, the defendant is committed to civil jail for a period of 6 months.

30. Costs of the application to be borne by the Defendant.

Dated and delivered at Nyahururu this 28th day of September 2017.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE