



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC CIVIL SUIT NO. 267 OF 2015

RUTH WANJIRU KAHORO.....PLAINTIFF/APPLICANT

-VERSUS-

DR. GEORGE GITONGA GITAHI.....DEFENDANT/RESPONDENT

RULING

1. The application for determination is dated 10th June 2016 brought under the provisions of section 13 & 14 of the ELC Act, section 1A, 1B, 3A & 63 (e) of the Civil Procedure Act and Order 40 rule 3 (c) of the Civil Procedure Rules. The plaintiff/Applicant seeks the following prayers:

1. Spent

2. That the Defendant's said attorney Joyce Nyaguthi Kibetu be ordered to purge the contempt and in default be committed to civil jail for contempt of this Honourable Court's orders since they were served with the same and were present in Court on 7th March, 2016 when the order of stay was extended.

3. That the costs of this application be provided for.

2. That application is premised on the grounds inter alia that the defendant and his attorney Joyce Nyaguthi Kibetu have deliberately refused to comply with the orders of the Court and have begun to erect fences and develop roads affecting the applicant's suit properties. That these actions amount to trampling on the dignity of the honourable Court and stealing a match. The application is supported by the affidavit of the applicant sworn on 10th June 2017. The applicant deposes that she obtained an order of stay of execution from this Court on 16th December 2015 which orders were subsequently extended on 7th March 2016 awaiting a ruling on an application.

3. That the fences erected by the defendant and his attorney have enclosed together the applicant's plot numbers 38, 39 & 14. Her plot Nos. 50 & 55 have also been fenced together with plot numbers 51 and 54 which belong to Mercy Njeri. The applicant contends the acts complained of amount to impunity and blatant disobedience of the Court's order which acts should not be tolerated. She urged this Court to order the defendant to purge the contempt and in default commit them to the civil jail.

4. The application is opposed by the defendant vide a replying affidavit dated 14th October 2016 and filed in Court on 17th October 2016 and deposed to by his attorney Joyce Nyaguthi Kibetu. She deposed that even prior to the issuance of the order, the individuals who had purchased plots within the area from the

defendant had already taken possession and developed their plots. Further that the defendant had executed transfers in respect of most of the sub – divisions and handed them over to the owners prior to 16th December 2015 and from the date the stay order was given, the defendant has not executed any transfer in favour of any person who purchased a plot within the suit land.

5. The defendant has denied disobeying any Court order. Ms Nyaguthi also deny that the defendant or herself own any plots within the suit land having sold them in 1996. They have also denied erecting any fences enclosing the applicant’s plots and annexed photographs to disapprove the plaintiff’s averments. The defendant deposed that the fence complained of was erected by the applicant’s husband Mr Zephania Irura on June 2015. She also deposed that the photographs annexed by the plaintiff does not show she has been prevented from accessing her plots. She urged the Court to dismiss the present application. These averments were not controverted by the applicant by way of supplementary affidavit.

6. The parties filed written submissions which I have read and considered. The orders complained to have been disobeyed by the defendant and his agent is annexed as **RWK – 1** to the plaintiff’s supporting affidavit. It read thus: **“That in the interest of justice and so that the application is not defeated, I shall grant an order of stay of execution for a period of 28 days”.**

7. The applicant first moved this Court vide his notice of motion dated 16th October 2015 seeking orders of temporary injunction as set out in the prayers. The application was supported by the affidavit sworn on the same date annexing several documents. Amongst these documents were photographs of the plot attached and referred to as **RWK – 16** at page 52 and 53 of the application. The applicant also referred to annexure **RWK – 11** which is a sketch called superimposition of topographic survey of old survey scheme on new survey scheme. In annexure **RWK – 16** are photographs showing existing fence (comprised of posts & barbed wire) while **RWK – 11** is described in paragraph 20 of that affidavit to refer to new beacons placed on her plots.

8. The applicant deposed in paragraph 39 of her affidavit of 16.10.2015 thus:

“That I have developed my plots Nos. being 38, 14, 39, 50 & 55 – annexed hereto RWK – 16 are photographs.”

As I pointed out above these photos show an already existing fence and some buildings. In the current application annexures **RWK – 2** also shows photographs at page 8 – 9 of a fence (comprised of posts and barbed wire and someone standing either inside or outside that fence). Page 10 is a photo of a person holding something identified as **“original beacon”** and a Saloon car parked nearby. Page 11 shows two tractors – one parked & the other digging. What I note from this last photograph is that the place looks different from the initial pictures as visible is a thick bush on the left side of the tractor which is not visible both in the photographs annexed at page 8 – 10 of this application and the application of 16.10.15.

9. The applicant in paragraph 7 and 8 of the supporting affidavit deposes that the fences erected have enclosed together her plots Nos. 38, 39, 14 and those of Mercy Njeri Nos. 51 and 54. If some fences were existing as at the time of the commencement of this suit, the burden was upon the applicant to present evidence that the fence existing previously is different from the current fences she is complaining of. The complaint of not accessing the main road was not in issue in the original application for which stay was given. Neither is the road explained to be constructed on which suit plots. Lastly the applicant referred to beacons/boundaries of her plot being affected since the size of her plots will be reduced. This is the gist of her complain/suit and the basis of seeking the injunctive reliefs which was refused by this Court and which forms the basis of her appeal.

10. It is a well established principle of law that the standard of proof in contempt proceedings is higher than that in civil cases because the punishment for contempt is punishment in the form of imprisonment which restricts the liberty of a person if found guilty. Secondly the burden of proving the contempt lies on the person who alleges in this instant the applicant. After analyzing the facts as presented by the applicant, I find that she has failed to discharge the burden of proof. Although the order of stay of execution was given in the presence of the defendant and or his attorney, the applicant failed to

demonstrate to this Court what new activities the defendant and or his attorney has done that is contrary to the order of stay. I have given explanation in paragraph 8 & 9 above that the applicant did not differentiate the fence and beacon she is complaining of to be different from those in the application of 16.10.15. She did not also explain on what plots the tractor was working on and any explanation by way of affidavit who instructed the operator of that tractor to work on the land or expert report to verify that the said plots have now been enclosed with a new fence.

11. The applicant in my view is attempting to have the defendant punished by revisiting the facts and evidence relied on in support of the application for injunction instead of pursuing her appeal and or the hearing and determination of this suit on merits. In the result, I find the current application as lacking in merit and abuse of the Court process. The same is dismissed with costs to the defendant/Respondent.

Dated, signed & delivered at Mombasa this 6th day of October 2017

ANNE OMOLLO

JUDGE