



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT OF KENYA
AT ELDORET
E & L CASE NO. 94 OF 2016

JACKSON KIPROTICH KIBOR.....PLAINTIFF

VERSUS

KIPRUTO ARAP LELEI.....1ST DEFENDANT

SAMUEL KIPRONO SAMOEI.....2ND DEFENDANT

TANGUAR ARAP SUGE.....3RD DEFENDANT

SEREI ARAP LEL NENGIT.....4TH DEFENDANT

CHELULE KEINO.....5TH DEFENDANT

WESLEY KIMELI SAMBAI.....6TH DEFENDANT

WILSON KIPKERING KOGO.....7TH DEFENDANT

KIPROTICH ARAP KIBIWOTT.....8TH DEFENDANT

GEDION KIPRUTO CHEMIRON.....9TH DEFENDANT

THE ATTORNEY GENERAL.....10TH DEFENDANT

ELKANA KIPLETING KIBOR.....11TH DEFENDANT

EVANS KIPKOSGEI KIBOR.....12TH DEFENDANT

EZEKIEL KIPNG'ETICH KIBOR.....13TH DEFENDANT

ERICK KIPCHUMBA KIBOR.....14TH DEFENDANT

RAYMOND KIBITOK KIBOR.....15TH DEFENDANT

KESENCHÉ "B".....16TH DEFENDANT

KESENCHÉ “A”.....17TH DEFENDANT

EDWIN KIPKOECH KIBOR.....18TH DEFENDANT

THE CHIEF LAND REGISTRAR.....19TH DEFENDANT

THE COUNTY LAND REGISTRAR, UASIN GISHU COUNTY...20TH DEFENDANT

RULING

Jackson Kiprotich Kibor, (*hereinafter referred to as the plaintiff*) has come to court under Certificate of Urgency praying that an injunction does issue restraining the 12th and 13th respondents by themselves and or through Mr. Justus Kipchumba Lagat and/or through whosoever, whatsoever from cutting and/or harvesting and/or entering the 300 acres hitherto belonging to the plaintiff/applicant. The plaintiff further prays that the 12th and 13th respondents be cited for contempt of court in violating court orders issued on 27.2.2017 with a view to being committed to civil jail for a period of up to 6 months or a fine or both.

The applicant further prays that he be allowed to cut and harvest the maize in the 300 acres and that 2 Defendants/Respondents do purge the contempt already committed inclusive of an offer of redress for the contempt committed, including a payment to the Applicants/Plaintiff and written undertaking to abstain from further acts of contempt and written undertaking to vacate the 300 acres, within two (2) days of this honourable court's orders. That for purposes of enforcing court orders, and for purposes of maintaining law and order, the orders made in this case be served on the Uasin Gishu County Commissioner, the O.C.S., Central Police Station Eldoret, Uasin Gishu County and the area chief. That the Defendants/Respondents do report to the OCS, Central Police Station Eldoret, Uasin Gishu County every 14 days for the next one (1) year after purging the contempt so as to confirm compliance with the details of the orders made by the Court.

The applicant requests the court to be at liberty to summon the relevant area Chiefs and or OCS, for information as to the status quo prior to January 2016, the earlier acreages, occupation and the relationship between the 2 Respondents and the Applicant. That the costs of this Application be paid by the 2 Defendants/Respondents.

The application is based on grounds that orders were issued on 27th February 2017 stating inter alia that status quo be maintained. In an affront of the court orders the 2 Defendants/Respondents have entered and started to cut and harvest maize on 300 acres on a parcel belonging to the Plaintiff, and over an area more than the area they previously used and occupied. All these are in breach of the orders stating that the *status quo* be maintained. The two alleged contemnors, Evans and Ezekiel are adults and the Applicant /Plaintiff's sons. According to plaintiff, the Respondents have violated the orders requiring that each party stays, and utilizes parcels they already occupied respectively, by way of maintaining *status quo*. The two Respondents have particularly entered since Saturday 7th October 2017 Plaintiffs 300 acres in LR 8300 and LR 8301. The entry was by the two Respondents Evans and Ezekiel by themselves, their representative one Justus Kipchumba Lagat and other people acting for and on their behalf.

The Plaintiff/Applicant in planning to obtain peace, amity and civility had asked the area chief to intervene. The chief Confirmed that the parcel was hitherto in the use and was utilized by the Plaintiff/applicant. This is within the intention and purpose of the status quo. The chief asked the person purporting to act on behalf of the two Respondents, Evans and Ezekiel on account of a lease he said he got from the 2 and he [Justus K. Lagat] confirmed that he respects the Plaintiff/Applicant's right over the 300 acres that had existed for long before the case was brought to court. As a result of the breach of the status quo, a demand has been sent to the Applicant/Plaintiff by the person who used the 300 acres in 2015 and 2016 and was due to use of the parcel in the year 2017. The two Respondents do not purport nor pretend that the Plaintiff owes them any land on account of any valuable consideration by way of purchase or otherwise. The Plaintiff is the bona-fide owner with title to the parcel in issue.

According to the plaintiff, the 12th and 13th Defendants together with the other Defendants hold a title, but which has been challenged as the original title was not surrendered. The two Respondents, Evans and Ezekiel in preparation to seize the land, attacked and tried to physically evict the Plaintiff/Applicant in March 2017 unsuccessfully. The attempt was by way of physical visit to tell the Plaintiff/Applicant to stop ploughing the parcel and subsequently made a report to police, criminal case No. 1002 of 2017 which is ongoing.

Unsuccessful attempts were made to use the orchestrated criminal complaint and case situation in this civil court to seize the 300 acres land from the Plaintiff. The criminal case has come up for hearing for about 5 hearings at all of which the two Respondents did not attend court. The applicant believes that no party will be prejudiced if an order is made ex-parte to stay further acts of cutting and harvesting the maize for a few days to enable parties get the court's directions. Unless restrained, punished and compelled to purge the Respondents will continue to view themselves as law unto themselves and will make the start of the 2018 ploughing season preparations and utilization hazardous complicated and difficult. If orders and issues raised herein are admitted to hearing and determined at the earliest possible opportunity 2 Defendants/Respondents will suffer no irreparable damage as they will be afforded an opportunity to be heard. In case of delay the Plaintiff will suffer continued torture waste of resources, deprivation and the Court's reputation will continue to dissipate.

The plaintiff/applicant prays for orders to Cite the 2 defendants/respondents for contempt and punish them and Injunctions to stay further waste and damage. The Defendants/Respondents be afforded an opportunity to purge the contempt already committed inclusive of an offer of redress for the contempt committed, including a token payment to the Applicants/Plaintiff, Written undertaking to abstain from further acts of contempt and Written undertaking to vacate the 300 acres, within two (2) days of this honourable court's orders.

The application is supported by the affidavit of Jackson Kibor who states that he seeks to cite Evans Kipkosgei Kibor and Ezekiel Kipng'etich Kibor the 12th and 13th Defendant/Respondent for contempt of court orders issued on 27th April, 2016 and those issued on 27th February, 2017 and that the two, Evans and Ezekiel are adults and are his sons. That the Respondents have violated status quo orders requiring that each party stays, and utilizes parcels they already occupied respectively.

That in an affront of the court orders the two Defendants/Respondents have entered and started to cut maize and harvest on 300 acres an area which was previously used and occupied by himself contrary to the orders stating that the status quo be maintained. That the two Respondents have particularly entered his 300 acres farm since Saturday 7th October 2017 in LR 8300 and LR 8301 and that the entry was by the two Respondents Evans and Ezekiel by themselves their representative one Justus Kipchumba Lagat and other people for and on their behalf.

Evans Kipkosgei Kibor states that he has always confined all his farming activities to his parcel number SOY/KAPSANG BLOCK 10(EATEC)/14. That he is the registered absolute proprietor of land parcel number SOY/KAPSANG/BLOCK 10 (SAMIT01)14 and undertook farming activities on arable 172 acres as follows chronology, Ploughed the parcel in February, 2017, planted maize seed on 3.4.2017, Weeded the maize crop in May, 2017, Top traced in June, 2017, staking of the maize started 5.10.2017. That to the best of his knowledge the *status quo* order was order made in view of his previous occupation and use of the parcel in many years prior to filing of the suit by the plaintiff.

The plaintiff's application has not demonstrated how and when he upsets the status quo and how harvesting of the maize he planted now turns to be in contempt of the status quo when planting was not. The request to involve the chief and O.C.S to testify is shopping for evidence at an interlocutory stage of the proceedings.

That it is strange and extremely unreasonable for the plaintiff to stay silent all through the land preparation and only wakes up at harvest time in October, 2017 and seeks to stop harvesting of his maize crop planted in April ,2017. In any event, he has since harvested the crop and will be completing the exercise shortly. Any stoppage would result in total damage and waste of the crop due the heavy rains

presently experienced. The Applicant has not given any undertaking as to damages. That at the Plaintiff/Applicant appears to be bent on harvesting where he did not sow. This will amount to unjust enrichment and extremely inequitable, unjust and indeed illegal.

The Plaintiff appears to seeking orders to retrain the independent contractors from undertaking their commercial activities when they have nothing to do with these proceedings or dispute over the suit land. He is within his rights to contract the services of whomsoever he shall consider able to offer services to him within his 200 acres. That the plaintiff has occupation and use of his parcels numbers 16 and 17. That the memorandum of understanding referred to in paragraph is of no assistance to the court as any acknowledge or otherwise by a stranger does not bind him. That the Plaintiff is intent on disturbing the status quo in advance of the 2018 crop season as clearly revealed in paragraph 15 of the plaintiff's affidavit.

According to the respondents, the application for injunction is without basis as the 2nd respondent is the registered proprietor of the suit parcel number 14 and has had actual and effective occupation and use of the same for many years, there is no prima facie case to form a basis for an order of injunction restraining a party who is possession. That the Plaintiffs application for injunction and contempt is likely to result in eviction, which is undesirable rather than enforcement of respect for the court and its orders.

That the Plaintiff's prayer for purging of an alleged contempt is not made in good faith as that would result in destruction of his 200 acres of maize, which would be a big loss of food crop. That the prayer that the respondent be ordered to report to the police is outrageous and unconstitutional. These are not criminal proceedings. That the plaintiff passed proprietorship by way of *inter vivos* gift in his favour, which disposition was conscientious and voluntary and the gift of land is irrevocable.

Ezekiel Kipnetich Kibor states that he is informed by my counsel on record which information he verily believes to be true that no order of court restraining a person to do or abstain from doing any act may be enforced unless a copy of the order has been personally served on the person required to do or abstain from doing the act in question. That he is further informed by his counsel on record which information he verily believes to be true that the court will not punish for contempt unless it is satisfied that the defendants had proper notice of terms and breach of injunction must be proved beyond reasonable doubt.

That it is evident from the affidavit of service annexed to the Plaintiff's application sworn by one Millicent Kambani on 3/5/2016 that he was never duly served with the court orders. He is informed by counsel on record which information he verily believes to be true that the said affidavit of service contravenes the provisions of order 5 Rule 15 of the Civil Procedure Rules for failing to indicate the manner in which he was served, the address of the person identifying him during the said service, where the same took place and whether anyone witnessed the delivery of the orders.

That he is informed by his counsel on record which information he verily believes to be true that the court orders issued by this Honourable Court on status quo meant that each party was to occupy and/or utilize part of the land under their control before the commencement of this suit. That he holds a land title deed in respect of 200 acres of land where he has been in occupation long before the commencement of this suit. That he has not in any way whatsoever, trespassed or entered into anybody's land particularly that of the Plaintiff. He denies the allegation that he entered, cut and/or harvested the maize on 300 acres on a parcel of land belonging to the Plaintiff.

That he is aware that this Honourable Court issued an order on 20th May 2016 restraining the Plaintiff, his servants and/or agents from encroaching, trespassing, cultivating, planting or constructing on or in any way utilizing the 13th Defendant's parcel of land. This application has therefore been made in bad faith and an abuse of the court process. That it is evident from the Plaintiff's annexure marked JKK-X P 18-20 that it is the plaintiff who has acted in defiance with the orders of this honourable court and should be punished for contempt and be committed to civil jail. He further states that he has never attacked and/or physically evicted the Plaintiff from his land. In any case, it is the Plaintiff who threatened to kill him using his gun prompting him to report the matter to the police and he is facing criminal charges. That he is informed by his counsel on record which information he verily believes to be true that the court cannot

punish for contempt unless the orders are clear and unambiguous. That he stands to suffer a great prejudice should the court grant the orders sought by the Plaintiff.

I have considered submissions by parties and the law on contempt in Kenya which has followed a well beaten path but cannot be described as static. For instance, **Lenaola J** in the case of **Basil Criticos Vs Attorney General and 8 Others [2012] eKLR** pronounced himself as follows: -

“...the law has changed and as it stands today knowledge supersedes personal service.....where a party clearly acts and shows that he had knowledge of a Court Order; the strict requirement that personal service must be proved is rendered unnecessary”

This position has been affirmed by the Court of Appeal in several other cases including the **Wambora case**. It is important however that the court satisfies itself beyond any shadow of a doubt that the person alleged to be in contempt committed the act complained of with full knowledge or notice of the existence of the order of the Court forbidding it. The threshold is quite high as it involves possible deprivation of a person’s liberty. This standard has not changed since the old celebrated case of **Ex parte Langley 1879, 13Ch D. 110 (C.A)**, where **Thesiger L.J** stated as follows. at p. 119:

“...the question in each case, and depending upon the particular circumstance of the case, must be, was there or was there not such a notice given to the person who is charged with contempt of Court that you can infer from the facts that he had notice in fact of the order which has been made? And, in a matter of this kind, bearing in mind that the liberty of the subject is to be affected, I think that those who assert that there was such a notice ought to prove it beyond reasonable doubt.”

Black’s Law Dictionary, 9th Ed defines notice as follows: -

“A person has notice of a fact or condition if that person-

Has actual knowledge of it; Has received information about it; Has reason to know about it; Knows about a related fact; Is considered as having been able to ascertain it by checking an official

in Shimmers Plaza Limited v National Bank of Kenya Limited [2015] eKLR Karanja Mwera And Mwilu JJA OBSERVED,

“Would the knowledge of the judgment or order by the advocate of the alleged contemnor suffice for contempt proceedings? We hold the view that it does. This is more so in a case such as this one where the advocate was in Court representing the alleged contemnor and the orders were made in his presence. There is an assumption which is not unfounded, and which in our view is irrefutable to the effect that when an advocate appears in court on instructions of a party, then it behoves him/her to report back to the client all that transpired in court that has a bearing on the client’s case. This is the position in other jurisdictions within and outside the commonwealth.”

In addressing the issue whether service of a judgment or order on the solicitor for the Ministers is sufficient knowledge of the order on their part to found liability in contempt; the Supreme Court of Canada in **Bhatnager v. Canada (Minister of Employment and Immigration), [1990] 2 S.C.R. 217 at p. 226, LJ Sopinka**, held

that: -

“In my opinion, a finding of knowledge on the part of the client may in some circumstances be inferred from the fact that the solicitor was informed. Indeed, in the ordinary case in which a party is involved in isolated pieces of litigation, the inference may readily be drawn. In the case of Minister's of the Crown who administer large departments and are involved in a multiplicity of proceedings, it would be extraordinary if orders were brought, routinely to their knowledge, in

such a case there must be circumstances which reveal a special reason for bringing the order to the attention of the Minister.” (Emphasis by underline)

The Court went on to state that;

“On the cases, there can be no doubt that the common law has always required personal service or actual personal knowledge of a court order as a pre-condition to liability in contempt....Knowledge is in most cases (including criminal cases) proved circumstantially, and in contempt cases inference of knowledge will always be available where facts capable of supporting the inference are proved.(See Avery v. Andrews(1882) 51LJ Ch. 414) (Emphasis by underline)

In **United States v. Revie** 834 F.2d 1198, 1203 (5th Cir. 1987) the court held that the defendant had adequate notice of a show cause order because his attorney was on notice. Therefore, a client may be similarly "served" with a court's order by his attorney's communication of its contents and this communication is presumed if the attorney has knowledge of the order.

This court finds that the order of status quo was issued by the court in the presence of the alleged contemnors and or their advocates and therefore they are presumed to have known the existence of the court order. It cannot be gainsaid that the duty to obey the law by all individuals and institutions is paramount in the maintenance of the rule of law, good order and the due administration of justice.

As stated by Romer, L.J. In **Hadkinson –vs- Hadkinson**, (1952) ALL ER 567,

“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. Lord Cottenham, L.C., said in Chuck –vs- Cremer (1) (1 Coop. temp.Cott 342):

“A party, who knows of an order, whether null or valid, regular or irregular, cannot be permitted to disobey it... It would be most dangerous to hold that the suitors, or their solicitors, could themselves judge whether an order was null or valid- whether it was regular or irregular. That they should come to the court and not take upon themselves to determine such a question. That the course of a party knowing of an order, which was null or irregular, and who might be affected by it, was plain. He should apply to the court that it might be discharged. As long as it exists it must not be disobeyed.”

Further, this Court in **Refrigeration and Kitchen Utensils Ltd. –vs- Gulabchand Popatlal Shah & Another**, -Civil Application No.39 of 1990 held,

“... It is essential for the maintenance of the rule of law and good order that the authority and dignity of our courts is upheld at all times.”

The above pronouncements of law are still valid but some people still have the audacity to disobey court orders. This court states that court orders must be obeyed. Parties against whom such orders are made cannot be allowed to trash them with impunity. Obedience of Court orders is not optional, rather, it is mandatory and a person does not choose whether to obey a court order or not. *No man is above the law and no man is below it. Obedience to the law is demanded as a right and not as a favour.*

The courts should not fold their hands in helplessness and watch as their orders are disobeyed with impunity left, right and centre. This would amount to abdication of our sacrosanct duty bestowed on the court by the Constitution. The dignity, and authority of the Court must be protected, and that is why those who flagrantly disobey them must be punished, lest they lead us all to a state of anarchy.

I have considered the application and do find that on the 31.5.2016, the court issued an order in this

matter that status quo to be maintained on the ground and that no person to be evicted. This order was issued in the presence of all counsel and therefore, the issue of service does not arise. The order meant that parties to continue utilizing the land in possession pending the hearing and determination of the case. This case has not been determined and therefore, the court expects parties to continue utilizing the land occupied until determination.

I do find that the plaintiff's application is premature and therefore, it is not allowed. I do order that the maize to be harvested by the 12th and 13th defendants. However, now that 12 months have expired since the order of status quo was issued the court is inclined to review the same, and the same is hereby reviewed by an order that, there will no ploughing and planting of any crop on the suit lands until the suit is heard and determined. Orders accordingly. Each party to bear own costs.

Dated and delivered at Eldoret this 24th day of November, 2017.

A. OMBWAYO

JUDGE