



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT OF KENYA
AT ELDORET

E & L CASE NO. 441 OF 2012

JOSEPH TIREITO.....PLAINTIFF

VERSUS

JACOB KIPSUGUT ARAP LAGAT.....1ST DEFENDANT

ANNA JEPKEMBOI NGENY.....2ND DEFENDANT

RULING

Joseph Tireito (hereinafter referred to as the Decree holder) has come to court against Ann Jepkemboi Ngeny praying that she be committed to civil jail for contempt of court and or for disobedience or breach of court orders issued on 30.9.2014. He prays that the court does commit her to civil jail for 2 years or such period as the court may order or as the court may order for disobedience or breach of court orders issued on 30.9.2014. The application is made on grounds that the court issued orders of stay on 30th September, 2014 inter alia that the plaintiff to have possession of 26.5 acres of which 2½ acres is **Eldoret Municipality Block 25 (Luliet)/2**. The order with the Penal Notice was served to the 2nd defendant that the 2nd defendant has forcefully invaded the suit land ploughed despite court orders and that the adverse dealing of the said 2½ acres piece of land is in breach of court orders in force. That it is necessary for the dignity of the court to be respected and the disobedience be purged. The application is supported by the affidavit of Joseph Tireito who states that the 2nd defendant has fenced off and closed the road leading to her house which has been blocked and has led to the plaintiff suffering irreparable loss and damage since he cannot access his house. He prays that he be allowed to take the two and one-half acres as ordered by the court. Ann J. Ngeny filed a replying affidavit stating that the application before court is fatally defective, incompetent, bad in law and should be struck out. That it is not true that she has acted in any way against the court orders of 30th September, 2014 and/or any other orders of any court as alleged. That she is an old lady, senior citizen and a law-abiding citizen of this country and at no time during her life time has she ever disobeyed a Court order. That she has never been served with any court order claimed to have been breached. That she does not know any one by the name Timothy Kamau Njoroge and neither has she ever met such a person before.

That it is not true that the purported Timothy Kamau Njoroge or anyone visited her home to serve her with a court order and she refused to acknowledge the same. Since this matter begun, she has religiously been receiving court processes and there can be no reason why she would refuse to accept a court order. That this matter is being handled by her lawyers, M/S. Nyairo and Company Advocates and M/S. Arap Mitei and Company Advocates, if there is any order and/or any action to be undertaken by her, they will have told her. To date, she has not been asked and/or directed to do anything in this matter by the Court and declined to warrant the grant of the orders sought.

The alleged contemnor claims that she has not fenced off the suit property as alleged by the Plaintiff/Applicant. On 21st January, 2016, she was called to Nyairo's office over a letter dated 16th January, 2016 by the Plaintiffs Advocate. She was explained to the content of the said letter which was a complaint but she did not have any response since she was not aware of any such acts complained of. That on returning home, she learned from her grandchildren that, they reinforced the already existing fence of their land on realizing that the old posts were rotten and had broken and some of them had been burned and/or damaged by the Plaintiff/Applicant. That she walked around her land and confirmed that all that her grandchildren had done was to repair the fence to strengthen it and look presentable and nothing more.

There has and there is nothing new done on her land and/or the subject suit land to warrant the grant of the orders sought. That she has sought from her Advocate to know the content of the court order claimed to be the one she is in breach of and having been explained to, she claims that she has never been served with the said Court Order, and had never seen it prior to her visit to her advocates' office on 26th January, 2016. The court order which has been brought to her attention does not bar and/or prevent her and/or the repairs of the fence to her farm in any way. That even assuming it prevented her, which is not the case, she is not the one who repaired the fence and/or the repairs were not undertaken by her to warrant the complaints. The court order does not prevent her from utilizing her parcel of land that is not the subject matter of these proceedings in any way. That she has a back problem and she cannot hold a jembe to plough as claimed by the Plaintiff/Applicant. That in fact her entire parcel of land is unploughed and it is not true that any one has done anything on the land. That it is only fair that the court orders the Plaintiff/Applicant to stop interference until the appeal pending in the Court of Appeal is heard and determined on merit.

The alleged contemnor states that the issue of possession of 26.5 acres (2^{1/2}) acres is the subject matter on appeal and this Honourable court can deliberate on the same as it will amount to this court sitting on its on appeal which is against law of the land. That the subject portion of land and/or property 2^{1/2} acres subject of the appeal to the Court of Appeal is intact and no one has attempted to interfere with it and/or mutilate it in any way and therefore the orders sought by the Plaintiff/Applicant cannot issue. She knows of her own knowledge that the portion the Plaintiff/Applicant purports to claim to be his has for many years been occupied by her children and what her children do in their compounds, is not her concern and have no control over the same.

That it is clear from the decree holder's action that he is intend on executing the court decree which is the subject of appeal to the Court of Appeal through the back door and this Honourable court should not entertain such actions on the part of the Plaintiff/Applicant. THAT annexures JT 6(a) JT 5(b) and JT 6 (c) simply show the new posts introduced to reinforce the fence and/or repair of the falling fence and nothing more. There is no destruction of property and/or interference with the subject matter at all from the attached photographs. That her farm has not been ploughed at all and the Court can visit the land to see for itself. That if anything, the reinforcement of the fence adds value to the property and cannot in any way be said to be interference in any event the reinforcement of the fence is on her land and not on the Plaintiff's/Applicant's portion of land.

In the supplementary affidavit by Joseph Tireito, he states that the respondent was indeed served by the said Timothy Kamau who has detailed in his affidavit of service, how he effected service. In addition, thereto, it is the applicant herein who applied for the orders of stay that are subject matter of the contempt proceedings herein, and as an interested party attended court on 30.9.2014 when the ruling was delivered and she cannot claim otherwise and that her advocates were aware of the court order.

The respondent admits to have reinforced the fence, yet the evidence clearly shows that she fenced off the 2½ acres, thereby dispossessing him against the court order of 30.9.2014. That is clear that Justice Silah Munyao stated very clearly in paragraph 3 of his ruling that: "Possession of the 26.5 acres in dispute shall be with the plaintiff". However, the act of fencing it off has dispossessed him of the 2 ½ acres comprised in title No. Eldoret Municipality/Block 25/(Lutiet)/2.

The person in actual control of Eldoret Municipality/Block 25/(Lutiet)/2 is the applicant, not her children

or her grandchildren, and that responsibility cannot be placed on them when all along, the respondent knew what happened and was in charge. That further, that the rights of occupation by the respondent, ceased when the court made its judgment and ruling on 30.9.2014. That in reply to paragraphs 27, 28, 29, 30 and 31 of the said affidavit, he states that he has indeed been disposed of the said 2½ acres by the act of fencing.

That under Article 159 of the Constitution of Kenya, the law must address substantive justice, without regard to procedural technicalities. That the overriding objective of this court is to decide cases without regard to technicalities as per section 3 of the Environment and Land Court Act, Cap. 12 A. That he has been deprived of possession of the 2½ acres and he should be given the right to enjoy the use, occupation and possession of the same.

This court took time to visit the disputed parcel of land and found that the same is still being utilized by the 2nd defendant and that the fence has been reinforced by the 2nd defendant or her agents despite the court order that she surrenders the same to the plaintiff. The court saw the house that was blocked by the acts of the 2nd defendant or her agents. I have carefully considered the affidavits on record and the submissions by both parties and do find that on the 30th September 2014 this court made an order inter alia that the possession of the 26.5 acres be given to the plaintiff pending appeal. The 2nd defendant has never given the plaintiff possession of the same 3 years down the lane. The order was made by justice Sila Munyao in the presence of E.M. Balongo counsel for the plaintiff and Mr. Arap Mitei counsel for the applicant. I have also looked at the affidavit of service by Timothy Kamau Njoroge and am satisfied that the 2nd defendant was served by the said process server and therefore I am convinced beyond balance of probabilities that the 2nd respondent is aware of the court order.

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”

For, 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 question. That the course of a party knowing of an order which was null and irregular, and who might be affected by it, was plain, he should apply to court that it might be discharged. As long as it exists, it should not be disobeyed.” Per Lord Cottenham L.C in Chuck Vs Cremer (1) 1 COOP TEMP COTT 342).

The law on contempt has been rigid on personal service but the same is changing in the sense that knowledge of the court order is sufficient for the court to determine that a party is in contempt. Under Rule 81:8 of the Supreme Court of England Rules of England, (1), In the case of a judgment or order requiring a person not to do an act, the court may dispense with service of a copy of the judgment or order in accordance with Rule 81:5 to 81:7 if it is satisfied that the person has had notice of it by being present when the judgment or order was given or made or by being notified of its terms by telephone email or otherwise. In the case of any judgment or order the court may dispense with service under rules 81:5 to 81:7 if the court thinks just to do so or make an order in respect of service by an alternative method or at an alternative place.

In the court of Appeal decision of **Justus Kariuki Mate & Another Vs Martin Nyaga Wambora & Another (CA 24/2014) Nyeri**, the CA per Visram, Koome and Odek JJA held that personal service of the order alleged to have been disobeyed is not mandatory. The court stated:

“On the other hand, however, this court has slowly and gradually moved from the position that

service of the order along with the Penal Notice must be personally served on a person before contempt can be proved. This is in line with the dispensations covered under rule 81:8 (1) (Supra)."

The Court of Appeal in the case of **Shimmers Plaza Ltd Vs NBK (2015) Eklr Karanja, Mwera, Mwilu JJA** also approved the growing jurisprudence right from the High Court that has reiterated that knowledge of a court order suffices to prove service and dispenses with personal service for the purposes of contempt proceedings. The Court of Appeal in the above Shimmers Plaza case cited with approval Hon **Lenaola J in Basil Criticos Vs Attorney General & 8 Others (2012) eKLR** where the learned Judge pronounced himself thus: -

"... 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."

The CA in **Shimmers Plaza Ltd (Supra)** also affirmed the position in the **Martin Wambora** case and emphasized that.

"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 **EXPARTE LANGELY 1879, 13 Ch D/10 (CA)** where Thesiger L. J stated at P. 119 as follows:-

"...the question in each case, and depending upon the particular circumstances of each 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 Edition defines notice as: -

"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 filing or recording."

The court in the **Shimmers Plaza Ltd** case found that knowledge of the judgment or order by the advocate of the alleged contemnor sufficed it for contempt proceedings, particularly where the advocate was in court representing his client (alleged contemnor and the orders were made in his presence.).

The same issue of knowledge was also canvassed by the Canadian Supreme Court in the case of **Bhatnager Vs Canada (Minister of Employment and Immigration (1990) 2 S C R 217 Per L.J. Sopinka** who held:-

"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 Vs Andrews (1882) 51 L J Ch 414).

I do find that there is sufficient evidence that the 2nd defendant was aware of the court order as he was served and that the order was made in the presence of his advocate. Has the order been breached by the 2nd defendant? This court finds that by refusing to give possession off the whole 26.5 acres, the 2nd

defendant was in breach of the court order. The 2nd defendant cannot blame her children or grandchildren as they are not parties herein and that she has not shown that they have any proprietary interest in the property. Having found that the defendant disobeyed the order issued by the court, I do order that she be jailed for a period of two months and in the alternative, pay a fine of kshs.100,000. The 2nd defendant is hereby ordered comply with the court order immediately by giving the plaintiff possession as ordered by the court.

Dated and delivered at Eldoret this 6th day of November, 2017.

A. OMBWAYO

JUDGE