



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT GARISSA
ELC CASE NO. 1 OF 2017

ABDIKARIM MOHAMED ALI.....1ST PLAINTIFF

SHEIKH HASSAN SHEIKH ALIGELI.....2ND PLAINTIFF

VERSUS

ALI DIGARE GURE.....1ST DEFENDANT

MOHAMED ABDI MAOW.....2ND DEFENDANT

HASSAN ABDI MAOW.....3RD DEFENDANT

NOOR GEDI ELMI.....4TH DEFENDANT

DIHISON MOHAMED ELMI.....5TH DEFENDANT

ADOW SALT DAGANE.....6TH DEFENDANT

OMAR JELLE ADAN.....7TH DEFENDANT

ISSE IDLE ADAN.....8TH DEFENDANT

ABDULLAHI ADAN ELMI.....9TH DEFENDANT

SHABOW MOHAMED ELMI.....10TH DEFENDANT

RULING

This is the ruling arising from the Notice of Motion dated 15th June 2017 brought under Section 5 (1) of the Judicature Act Order 40 Rule 3 (1) CPR, Order 51 Rule 1 CPR and Rule 81-4 of the Contempt of Court Civil Procedure Rules of England. The applicant is seeking the following orders:

1. (Spent)

2. THAT this Honourable court do find the respondents are in contempt of court for disobedience of the order of this honorable court issued on 3rd June, 2016.

3. THAT upon grant of prayer (2) above, this honorable court do impose the penalty of a fine of Kenya shillings one million (Kshs.1,000,000/=) against the respondents and in default of such fine all moveable and immovable assets of the respondents including land and buildings be attached and sold in execution of this order to satisfy the penalty for contempt.

4. THAT upon grant of prayer (2) above, this honorable court do issue an order that the respondents be committed to civil jail for a period of 6 months for disobedience of the orders of this honorable court issued on 3rd June, 2016.

5. THAT the respondents do meet the costs of this application. That application is predicated upon the affidavit of Sheikh Hassan Sheikh Aligedi sworn on 15th June, 2017 and grounds shown on the face of the application. In his affidavit, the applicant avers that on 3rd June, 2016, Justice Oloo issued orders restraining the respondents by themselves, servants, agents or any other person claiming under their authority. Hassan Khalif Maraabe the Chief Jarorof location within Korakora division from trespassing into, alienating, transferring or in any other way dealing with Fikir farm No. 29 or any part thereof pending the hearing and determination of the main suit.

He further contends that on diverse days and more precisely on 3rd May 2017, 4th May 2017, 5th May 2017, 2nd June 2017, the respondents together with their servants agents invaded the suit property, cut trees, burned charcoal and when he approached the farm, they chased him away using crude weapons. He reported to Garissa Police Station vide O.B No. 06/10/06/2017. The police arrested the respondent's servants but later released them without preferring any charges arguing that that was a civil case and advised him to cite them for contempt proceedings.

In opposing the application, the respondents filed a replying affidavit sworn by Hassan Abdi Maow on 20th July, 2017. In a nutshell, the respondents deny the applicant's allegations that they are in contempt of the orders of this court.

They also deny having trespassed into the applicant's farm known as Fikir Farm on any of the days alleged being 3rd May, 4th May, 5th May and 2nd June, 2017 respectively. The respondents also aver and maintain that they are legal owners of a neighboring farm known as JARIROT FARM and that they have had a protracted boundary dispute between the two farms. The respondent further content that they have never trespassed, invaded, alienated, or in any other way dealt with FIKIR FARM or any part thereof.

I have considered the affidavit in support of the application and the replying affidavit in opposition thereto. For an applicant to enforce an order of contempt, it must be shown that the respondent has been served with a copy of the order personally with a notice endorsed informing him of the consequence if he disobeys the order.

The court must also be satisfied that the terms of the order are clear and unambiguous and finally the breach must be proved beyond reasonable doubt. That was the decision in the case of **OCHINO & ANOTHER –VS- OKOMBO & 4 OTHERS (1989) KLR** at page 165 where the court held as follows:

“1. As a general rule, no order of court requiring a person to do or abstain from doing any act may be enforced (by committing him for contempt) unless a copy of the order has been served personally on the person required to do or abstain from doing the act in question.

2. The copy of the order served must be endorsed with a notice informing the person on whom the copy is served that if he disobeys the order he is liable to the process of execution to compel him to obey it.

3. The court will only punish as a contempt a breach of injunction if it is satisfied that the terms of the injunction are clear and unambiguous.

4. That the defendant has proper notice of the terms and the breach of the injunction must be proved

beyond reasonable doubt.

5. Since the correct procedure was not followed in bringing the application for contempt, there was no competent application before the Learned Judge and consequently no basis upon which the committal of the 1st appellant could be sustained.”

The applicant in this application has not attached a copy of the order form which they are seeking to enforce these contempt proceedings.

There is also no evidence that the respondents were served with a copy of the same together with a penal notice. In the upshot I find the application dated 15th June, 2017 lacking merit and the same is hereby dismissed. The costs of this application to be costs in the cause.

Read and Signed in the open court this 2nd day of November 2017.

E.C Cherono (Mr.)

ELC Judge

In the presence of:

1. Ijabo – Court clerk
2. Mr. Onono for respondent
3. Sheikh Hassan – 2nd applicant.