



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII

CIVIL SUIT NO. 320 OF 2014

**THOMAS OTUCHO BOGONKO(Suing as a legal representative of the estate of OTUCHO BOGONKO).....PLAINTIFF
VERSUS**

1. BENARD KENYATTA KENYANYA

2. MOI KENYANYA

3. GILBERT NYAMWEYA OMOKE

4. EVERLYNE GIKENYI

5. DAVID KENYANYA MAGARE..... DEFENDANTS

RULING

The plaintiff brought this suit against the defendants on 21st August 2014 through a plaint dated 20th August 2014. The plaintiff sought a permanent injunction restraining the defendants from trespassing onto, occupying or selling/disposing of any part of land parcel No. Wanjare/ Bogitaa/ 1537 or any part of the purported land parcel No. Wanjare/Bogitaa/1324. The plaintiff also sought an order cancelling and/or annulling the title for land parcel No. Wanjare/Bogitaa/1324 and rectification of the register and survey map of land parcel No. Wanjare/ Bogitaa/ 1537 to reflect its correct acreage.

On 6th November 2014, the plaintiff filed an application by way of Notice of Motion dated 28th October 2014 under certificate of urgency seeking among others; a temporary injunction to restrain the defendants from trespassing onto, occupying, selling or disposing of any part of land parcel No. Wanjare/ Bogitaa/ 1537 (hereinafter referred to as “the suit property”) pending the hearing and determination of this suit. The application came up for hearing before me *ex parte* on 6th November, 2014. I certified the same as urgent, granted the orders sought on an interim basis and fixed it for hearing *inter partes* on 19th November 2014.

When the application came up for hearing on 19th November 2014, the defendants' advocate sought and was granted time to respond to the application. The court adjourned the application to 3rd December 2014 and extended the interim orders. On 3rd December, 2014, the court adjourned the application at the request of the parties to a date to be taken at the registry on a priority basis. Once again, the interim orders were extended.

The plaintiff's application dated 28th October, 2014 is yet to be listed for hearing *inter partes* although the court had made an order that it be given a priority hearing date. What is now before me is another

application brought by the plaintiff by way of Notice of Motion dated 3rd February 2015 in which the plaintiff has alleged that the defendants have violated the *ex parte* interim orders that were issued herein on 6th November 2014. In this application, the plaintiff has sought among others, an order for the committal of the defendants to jail for duration not exceeding six (6) months and in the alternative, an order for attachment and sale of the defendants' properties to defray the damages occasioned by their disobedience of the said order. The application was supported by the plaintiff's affidavit sworn on 3rd February 2015 wherein he stated that pursuant to his application dated 28th October 2014, the court issued temporary orders of injunction against the defendants on 6th November 2014. He averred that the said orders were served upon the respondents' advocates on 17th November 2014. He annexed to his affidavit a copy of the said order that was stamped by the firm of Nyatundo and Company advocates in acknowledgment of receipt thereof. The plaintiff stated that on 6th and 7th January 2015, the defendants entered the suit property and proceeded to plough it thereby damaging the plaintiff's Napier grass, sugar cane and maize which had been planted on the property. The plaintiff attached to his affidavit photographs said to have been taken on the suit property which show the ploughed land and the resultant damage. The plaintiff averred that following the defendants entry onto the suit property as aforesaid, he caused the said order to be served upon the defendants personally on 13th January 2015. The plaintiff contended that despite service of the said order upon them, the defendants entered the suit property once again on 2nd February 2015 and continued to plough the same using a tractor. The plaintiff has contended that the defendants' acts aforesaid are contemptuous of the court process and ought to be punished as court orders are not issued in vain.

The application was opposed by the defendants through a replying affidavit sworn by the 1st defendant on 2nd April 2015. In the affidavit, the 1st defendant denied that the defendants trespassed on or ploughed the suit property as claimed by the plaintiff or at all. The 1st defendant stated that the 3rd and 4th defendants are registered as the owners of land parcel No. Wanjare/Bogitaa/1324 (hereinafter referred to as "Plot No. 1324") and are entitled to enjoy all rights and privileges associated with such ownership. The 1st defendant also relied on his replying affidavit sworn on 25th November 2014 in opposition to the plaintiff's injunction application wherein he had stated that the 5th defendant who is his father acquired Plot No.1324 as a bona fide purchaser for value without notice from Sospeter Maiko Moracha. He annexed a copy of an extract of the register of the said parcel of land as an exhibit. In the said affidavit the 1st defendant contended that there is a clear boundary between the suit property which is owned by the plaintiff and Plot No.1324 owned by the 3rd and 4th defendants. In proof of this claim, he annexed to his said affidavit sworn on 25th November 2014 a copy of the registry index map for the area where the two parcels of land are situated and a report from a private surveyor confirming that the two parcels of land exist on the ground side by side.

The application was argued by way of written submissions. The plaintiff in his submissions dated 17th June 2015 argued that on 6th November 2014, this court issued *ex parte* interim orders of injunction restraining the defendants from trespassing onto, occupying or selling /disposing any part of the suit property or destroying any subsistence or cash crops growing on the property pending the hearing of the application *inter partes*. The plaintiff has contended that the said order was extracted with a penal notice on its face on 12th November, 2014 and duly served upon the defendants' advocates on record on 17th November 2014 together with the application for injunction. The plaintiff has contended that subsequently, the same order was served upon the defendants personally on 13th January 2015. The plaintiff argued that despite their knowledge of the said court order, the defendants deliberately proceeded to disobey the same by forcefully entering the suit property and ploughing the same in the process of which they destroyed the plaintiff's crops which were growing thereon. The plaintiff has submitted that the rule of law requires that court orders are respected and obeyed even where a party is dissatisfied with the order. The plaintiff submitted further that the defendants are in contempt of court and having undermined the court's dignity and authority, they should be firmly dealt with so that the court's authority is not brought into disrepute.

The plaintiff submitted that every person against whom an order has been made by a court of competent

jurisdiction has an obligation to obey the same unless the order is varied or discharged. The plaintiff contended that the defendants cannot be heard in these proceedings unless they purge their contempt. In conclusion, the plaintiff urged the court to make a finding that the defendants disobeyed lawful orders of the court and as such are in contempt of court and liable to be punished in accordance with the law. In support of his submission, the plaintiff relied on the cases of **Loise Margaret Waweru vs. Stephen Njuguna Githuri, CA No. 198 of 1998**, **Jacob Zedekiah Ochino & another vs. George Aura Okombo & others, CA No. 36 of 1989** and **Mwangi HC Wang'ondu vs. Nairobi City Commission, CA No. 95 of 1998**.

In their submissions in reply dated 27th May 2015, the defendants reiterated the contents of their affidavits on record and submitted that the plaintiff has not demonstrated either in his application or the affidavit in support thereof how they disobeyed the court order in issue. The defendants submitted that they have never gone beyond Plot No. 1324 owned by the 3rd and 4th defendants. They submitted further that they were never served with the subject court order. The defendants submitted that even if the 5th defendant was served with the said order on 13th January 2015 as claimed by the plaintiff, the alleged acts of disobedience are said to have occurred on 6th and 7th January 2015, a period of 7 days before the alleged service.

I have considered the plaintiff's application together with the affidavit filed in support thereof. I have also considered the defendants' affidavits in opposition to the application together with the respective submissions by the parties. It is not contested that on 6th November 2014, the court issued interim *ex parte* order on application by the plaintiff restraining the defendants from trespassing onto, occupying or selling/disposing of any part of the suit property or destroying any subsistence or cash crops on the same pending the *inter partes* hearing of the application. It is not also in dispute that the said order was extracted and endorsed with a penal notice indicating the consequence of disobeying the same.

What is contested is the service of the said order and whether or not it was disobeyed. The plaintiff has contended that the order was served upon the defendants' advocates and the defendants personally on 17th November, 2014 and 13th January, 2015 respectively. The defendants have disputed the service contending that the same was not proper. The defendants have contended further that in any event the alleged service was effected 7 days after the acts complained of. According to the affidavit of service of Elijah Gekonge Nyangau sworn on 13th January 2015, the defendants' advocates' on record were served with the subject court order on 17th November, 2014 while the defendants were served through the 5th defendant on 13th January 2015. The process server has stated that the 5th defendant who is the father of the 1st and 2nd defendants who were away on the day of service accepted service on behalf of the 1st and 2nd defendants. The process server has not mentioned service upon the 3rd and 4th defendants. There is no evidence that the 3rd and 4th defendants were served with the court order made on 6th November 2014.

The defendants have also denied entering the suit property as claimed by the plaintiff. They have contended that if the orders sought by the plaintiff are granted, the court would have deprived the 3rd and 4th defendants of their statutory rights over Plot No.1324 in respect of which they are the registered proprietors. In his plaint, the plaintiff contended that Plot No. 1324 is non existent on the ground. In a replying affidavit sworn by the 1st defendant on 25th November 2014, the defendants contended that there is a clear boundary between Plot No. 1324 and the suit property. They exhibited a copy of an extract of the register for Plot No.1324 showing that the 3rd and 4th defendants were registered as the proprietors of the said parcel of land. They also exhibited a copy of the registry index map for the area which shows that the suit property and Plot No.1324 indeed exist adjacent to each other on the ground.

On the material before me, I am unable to determine whether the activities complained of were carried out on the suit property or on Plot No.1324. There seems to be a boundary dispute between the parties which is unresolved. From the evidence placed before the court, there is no indication as to which of the two parcels of land was allegedly ploughed by the defendants. Further more, the plaintiff has claimed that the defendants trespassed on the suit property on 6th and 7th January 2015, which was 7 days prior to the

date of service of the subject order upon the 5th defendant who is said to have received the same on behalf of the 1st and 2nd defendants. The plaintiff also contended that further acts of trespass took place on 2nd February 2015 after the defendants had been served with the order. There is no evidence to substantiate the allegations by the plaintiff that further acts of trespass were committed after service of the order upon the defendants assuming that they were served. There is also no evidence as to who was involved in the said further acts of trespass.

The standard of proof required in contempt proceedings is above a balance of probability but not beyond any reasonable doubt. See the case of **Mutitika vs. Baharini Farm Ltd (1985) KLR 227**. It is my finding that the plaintiff has not discharged this burden of proof. I am not satisfied that the defendants disobeyed the order that was made by this court on 6th November 2014. For the foregoing reasons, I find no merit in the application dated 3rd February, 2015. The same is accordingly dismissed. The costs of the application shall be in the cause.

Signed at Nairobi this.....Day of2016.

S. OKONG'O

JUDGE

Delivered and Signed at Kisii this 8th day of April 2016

J.M.MUTUNGI

JUDGE

In the presence of

.....**for the Plaintiff**

.....**for the Defendants**