



REPUBLIC OF KENYA
IN THE ENVIRONMENT & LAND COURT AT KISUMU
LAND CASE NO.293 OF 2014

VICTOR ONYANGO OGUTAHAPPLICANT

VERSUS

WILLIAM OTIENO OWITI.....RESPONDENT

RULING

1. Victor Onyango Ogutuah the Applicant, filed the notice of motion dated 25th May 2015 seeking to have **William Otieno Owiti**, the Respondent, cited and punished for contempt of court for disobeying the court order dated 7th October 2014. The application is based on the ten grounds on the notice of motion and supported by the affidavit of **Victor Onyango Ogutah**, sworn on 22nd May 2015 in which he among others deponed as follows;

- a) That the Respondent was personally served with the order of temporary injunction issued on 7th October 2014 on the 8th October 2014, restraining him from trespassing entering or in any way interfering with land parcel **5255** and **6065/Wawidhi 'A1'**, pending the hearing of the application dated 3rd October 2014.
- b) That out of malice and defiance, the Respondent continued to trespass and enter into the suit land and cultivated maize crops contrary to the court order.

2. The application is opposed by the Respondent through the replying affidavit sworn by **William Otieno Owiti** on 9th July 2015, in which he deponed to the following among others;

- a) That he has not disobeyed the court order inspite of the incessant and extreme provocations by the Applicant since instituting the proceedings.
- b) That the application is a vain attempt by the Applicant to waste the court's time s by avoiding the final determination of the main application.

3. The Applicant filed a further affidavit sworn by **Felix Ramago** confirming that he took and printed the photographs showing maize crops on plot number **5255 Wawidhi A1**, which was pointed out to him by the Applicant.

4. The counsel for the parties agreed on 10th November 2015 to have written submissions filed. The Applicant's counsel filed their 'dated 8th December 2015 on 30th December 2015. The Respondent's counsel filed their written submissions dated 2nd March 2016 on the 7th March 2016.

5. The following are the main issues for determinations;

a) Whether the Applicant has availed evidence to prove to a level beyond balance of probabilities that the Respondent has disobeyed the court order of 7th October 2014.

b) Whether the Respondent should be cited for contempt of court and if so what punishment to issue.

c) Who pays the costs of this application.

6. The court has carefully considered the ten grounds on the notice of motion, the supporting, further and replying affidavits, submissions by counsel and come to the following determinations;

a) That the Applicant commenced these proceedings through the plaint dated 3rd October 2014, that was filed contemporaneously with the notice of motion under certificate of urgency of even date. That the Applicant's counsel appeared before the court *ex parte* on 6th October 2014 when the application was certified urgent and prayer 2 which restrained the Respondent " **from trespassing, cultivating, entering, constructing on or in any way interfering, with the Applicant's peaceful enjoyment and use of the suit parcels of land known as PLOTS NO.5255 and 6065 WAWIDHI 'A1' ADJ pending the hearing and determination of this application,**" was issued.

b) That the order was extracted and issued on 7th October 2014. The applicant has in his supporting affidavit deponed that the order was served on the Respondent personally on 8th October 2014 and annexed a copy of the order thereof marked "V001" bearing acknowledgement by **William Otieno Owiti** on 8th October 2014. The Respondent has not disputed that fact in the replying affidavit and the submission by his counsel that no affidavit of service or other proof of actual personal service was availed has no basis. That had the Respondent intended to dispute service of the order, all he needed to do is to state so in the replying affidavit.

c) That the court is satisfied from the deposition of the Applicant in the affidavit sworn on 22nd may 2015 and further affidavit of **Felix Ramogo Siguda**, a photographer, sworn on 10th November 2015, that there was maize crops growing on plot **No.5255 Wawidhi 'A1'ADJ** on the 18th may 2015 and 9th November 2015 when the photographs annexed to the further affidavit were taken. The Applicant has deponed that the maize crops on those photographs were cultivated by the Respondent in disobedience of the court order of 6th October 2014 that was extracted and issued on 7th October 2014. The claim by the Respondent that he has not disobeyed the court order and that the Applicant was only being malicious cannot therefore be true. The court noted that the Respondent deponed in the replying affidavit sworn on 20th July 2014 in respect of the notice of motion dated 3rd October 2014 that he has been using the land number 2007 from which plot numbers 5255 and 6065 was subdivided from unlawfully. He further deponed that the Applicant has never been in possession of that land but did not deny that the maize crops on the photographs are growing on the suit lands. The Applicant cannot be the one growing those crops as according to the respondent knew he was in occupation.

d) That the application is indicated to be brought under **Section 1A, 1B, 3A of the Civil Procedure Act, Order 40 Rule 3 and 81 of the Civil Procedure Rules**. There is no dispute that this court has jurisdiction to punish a party who is proved to have willfully disobeyed its order, or demand that such a party purge the contempt or disobedience by complying with the terms of the order so as to ensure the fundamental supremacy of the law is upheld at all times.

e) That whether or not the Respondent has misgivings on the process that the Applicant followed to acquire the suit land does not give him a leeway on whether or not to obey the court order that demand his compliance. The option the Respondent had, which he has not taken advantage of, is to apply to review, stay or set aside such an order. However the court

agrees with the Respondent's counsel's submission that the order extracted and served on the Respondent did not have a penal notice and therefore no sanctions should issue.

f) That the authority/consent given to the Applicant by the Land Adjudication and Settlement Officer Nyando Sub County, under letter dated 17th September 2014 was " **to institute civil proceedings against one William Otieno Owiti whom he claims has trespassed and forcibly using his plot No.5255 within Wawidhi 'A1' Adjudication section**". The consent did not extend to filing suit on plot **No.6065 Wawidhi 'A1'** Adjudication Section or any other parcel. The Applicant did not disclose that fact to the court when he obtained the ex parte orders which included restraining the Respondent from, interfering with the latter parcel.

g) That the foregoing notwithstanding, the temporary injunction order pending the hearing and determination of the application dated 25th May 2015 in respect of plot **No.5255 Wawidhi 'A1' Adjudication Section**, is still in force and the Respondent is expected to obey it to the letter.

7. That for reasons set out above, the notice of motion dated 25th May 2015 is without merit and is dismissed with costs in the cause.

It is so ordered.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

DATED AND DELIVERED THIS 18TH DAY OF MAY 2016

In presence of;

Applicant Absent

Respondent Absent

Counsel M/S Omboto for the Plaintiff/Applicant

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

18/5/2016

18th May 2016

S.M. Kibunja J

Oyugi court assistant

M/s Omboto for the Plaintiff

Court: Ruling delivered in open court in presence of M/s Omboto for the Plaintiff/Applicant.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

18/5/2016