



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 411 OF 2013

JANE CHEMWENO.....PLAINTIFF/APPLICANT

VERSUS

PAUL K. CHEMWENO.....DEFENDANT/RESPONDENT

RULING

On the 7th day of August 2013, Jane Chemweno hereinafter referred to as the applicant filed originating summons against Paul K. Chemweno claiming to be a spouse and therefore had spousal rights in the ownership of that property known as Eldoret Municipality Block 4/101 which property is a matrimonial home and has been acquired and maintained during the subsistence of their marriage between the applicant and the defendant. She came to court for the determination of the following issues:

- 1. Whether the defendant by virtue of being registered as the owner of that property known as Eldoret Municipality Block 4/101 does hold the property in trust for the plaintiff.***
- 2. Whether the plaintiff has an overriding interests on the suit property by virtue of being the legal wife of the defendant and a resident of the suit property.***
- 3. Whether or not the defendant can validly deal or transact with the suit property exclusively with no regard to his spouse and family.***
- 4. Whether the plaintiff is entitled to costs.***

AND prayed for orders:-

- (a) That a permanent injunction to stop the defendant by himself or through agents from disposing or leasing or dealing with that matrimonial property known as Eldoret Municipality Block 4/101 without involving the wife.***
- (b) That there be a declaration that the plaintiff is an equal partner with overriding interests on that property known as Eldoret Municipality Block 4/101.***
- (c) That the plaintiff is entitled to costs of this suit.***
- (d) Any other reliefs deem fit and just for this court to grant.***

On the 8th August 2013, the matter was heard exparte before Hon Lady Justice G. W. Ngenye-Macharia and it was ordered that pending the hearing of the application inter partes, an injunction be issued to restrain the defendant by himself or through agents from disposing, leasing out or displacing the plaintiff

and her children from that property known as Eldoret Municipality/Block 4/101.

The applicant now seeks this court to commit the respondent to civil jail for a period of up to six months for blatantly disrespecting this honourable court by disobeying orders issued by the court on 8.8.2013 and 28.10.2013. The application is based on grounds that this Honourable Court issued orders on 8th August, 2013 and 28th October, 2013 restraining the respondent from ejecting the plaintiff/applicant, selling, leasing out, charging, or in any other way dealing with the suit land known as Eldoret Municipality/Block 4/101 until the conclusion of the suit. The respondent has acted with impunity by ejecting the applicant and her children from the said parcel and commenced construction despite the existence of court orders. It is alleged that the actions of the respondent are calculated at defeating the substratum of this suit and justice and that the applicant and her children have been rendered destitute.

The application is supported by the affidavit of **Jane Chemweno** who states that on 8th August 2013 and 28th October 2013, this Honourable court restrained the respondent herein from ejecting her and selling, leasing out, charging, or in any other way dealing with the suit land known as Eldoret Municipality/Block 4/101 until the conclusion of this suit and that the said orders were duly served upon the respondent. Despite having knowledge of the aforesaid court orders, the respondent herein, in perpetuation of impunity has ejected her and their children from the suit land rendering her and her children's destitute. The respondent has commenced wanton construction upon the property and has violently chased her and her children from the same. The actions of the respondent herein are pronged at lowering the dignity of this honourable court and defeating the substratum of this suit as the respondent is in blatant and voluntary contempt of the orders of this Honourable Court.

The application is also supported by the affidavit of **Titus Kipkosgei Chemweno** who states that the respondent has indeed chased away the applicant and his sister Diana Chemweno from the suit land and that the applicant and his little sisters are destitutes and struggling to pay rent in rental houses. **Diana Jemutai Chemweno** states that the respondent violently chased her from the suit land at night and has denied her access to the established home therein and denied her the right to process an Identity Card since she cannot access her personal belongings and documents. She registered the matter to Eldoret Police Station. She claims that they are now destitutes living in rental houses.

In his reply, **Paul K. Chemweno** states that the originating summons sought by the applicant pursuant to the provisions of Section 17 of the Married Women's Property Act, Article 45(3) of the Constitution and Section 93(1) of the Land Registration Act 212 is frivolous, vexatious, full of falsehoods, bad in law and/or an abuse of the court process and that it is not in dispute that the respondent and the Applicant got married on the 6th August, 1980 under the African Customary Law however, deny having ever resided in the suit property which is situated in Eldoret town. That it is therefore not true that they resided together as a family at their matrimonial home at Eldoret Municipality Block 4/101. The correct position is that the family has a big matrimonial home where they have stayed and lived over years namely KAHUNGURA/SETTLEMENT SCHEME PLOT NO. 220 measuring 20 acres. That the family has another matrimonial home situated at Kahungura Settlement Scheme Plot No. 210 measuring 20.5 acres.

The suit land namely Eldoret Municipality Block 4/101 situated in town (Eastern Avenue) was allotted to him by the Government when he was working as a director at K.V.D.A. and the entire family resided at their matrimonial home at Kahungura Scheme. The suit property has been in dispute over non-payment of the debt/loan owing and he had to borrow money to redeem it from being sold through public auction. He approached his colleague one Professor Rono who lent him Kshs.8,000,000/= so as to redeem his security property which the creditors were in the verge of exercising their statutory power of sale through private treaty or public auction. The applicant has been a thorn in his flesh since they solemnized their marriage. The Applicant fraudulently transferred the matrimonial property while he was on official duties (training) in the USA between the year 1980 and 1985.

He claims that he entrusted her with the responsibilities to manage and/or preserved the matrimonial home which he spent over Kshs.20,000,000/= however due to her greed she transferred the entire property into her name without his consent. That it is not true that he disposed off a developed property in Buruburu Phase 3 in Nairobi without informing the Applicant including lorry KAJ 333A and Tractor

KXH 037 and to the detriment of the Applicant and the family. The aforesaid property in Nairobi is subject of dispute pending before National Land Commission as some scrupulous grabbers are also claiming ownership. That the applicant has since willfully left all the matrimonial home and now squatting at ditching place in town without any plausible reason.

Mr. Kibii, learned counsel for the applicant submits that the respondent has been aware of the court order issued on 8.8.2013 but has disregarded and disobeyed the same by chasing away the applicant and 3 children and has leased out off the property. There is no order of separation. Mr. Kibii submits that the applicable law is section 29 of the Environment and Land Court Act.

Mr. Omboto, learned counsel for the respondent submits that the orders were issued exparte. That the applicant has not disobeyed the court order as he has never leased out the property.

I have considered the application, supporting affidavits and the replying affidavit and the submissions by counsel and do find that it is not denied that on 8.8.2013 and 28.10.2013, this court restrained the respondent from ejecting the applicant and selling, leasing out, charging or in any other way dealing with the suit land known as Eldoret Municipality/Block 4/101 until conclusion of the suit. The said orders were duly served as there are copies of return of service. It is trite law that the applicant only needs to demonstrate to the court that the alleged contemnor was aware of the court orders. It has been demonstrated in this application that the respondent was aware of the court orders.

The applicant alleges that she has been thrown out by the respondent. She is supported by the daughter and the son whose evidence is corroborative that the respondent has indeed chased away the applicant and her daughter from the suit land.

I do not believe the respondent when he states that the applicant deserted the matrimonial home situated in Kahungura Settlement Scheme many years ago (2013) and is now squatting in unknown place in town as the evidence of his son and daughter suggest otherwise that the respondent chased them from the matrimonial home which is the subject of this suit in disobedience of the court order. Moreover the Kahungura Settlement Scheme home is not the subject of this suit. The allegation of being “poisoned” by his daughter have not been proved as this being a police case, he should have reported to the police for the arrest and charging of his daughter. However, this court finds that the structuring of a garage is not in contempt of court so long as the same is authorized by the County Government of Uasin Gishu and that is operated by the respondent as opposed to being leased to a third party.

The power to punish for contempt is an important and necessary power for protecting the cause of justice and the rule of law, and for protecting the authority of the court and the supremacy of the law. In the Scottish case of STEWART ROBERTSON VS HER MAJESTY’S ADVOCATE, 2007 HCAC63, Lord Justice Clerk stated that;

“ contempt of court is constituted by conduct that denotes willful defiance of or disrespect towards the court or that willfully challenges or affronts the authority of the court or the supremacy of the law, whether in civil or criminal proceedings” The learned Judge further stated that: “The power of the court to punish for contempt is inherent in a system of administration of justice and that power is held by every judge.”

In the case of BOARD OF GOVERNORS MOI HIGH SCHOOL KABARAK VS MALCOLM BELL & ANOTHER, (Supreme Court PETITION NOS 6&7 OF 2013, the Supreme Court of Kenya described the power to punish for contempt as a power of the court “to safeguard itself against contemptuous or disruptive intrusion from elsewhere” and identified that power as one of the indisputable attributes of the court’s inherent power. “Without that power, protection of citizens’ rights and freedoms would be virtually impossible. Courts of law would be reduced to futile institutions spewing forth orders in vain.” In HEELMORE VS SMITH,(2)1886L.R. 35 C.D455, lord Bowen, LJ aptly stated the rationale for punishing for contempt as:-

“The object of the discipline enforced by the court in case of contempt of court is not to vindicate

the dignity of the court or the person of the Judge, but to prevent undue interference with administration of justice.”

Black's Law Dictionary (Ninth Edition) defines contempt of court as:

“Conduct that defies the authority or dignity of a court. Because such conduct interferes with the administration of justice, it is punishable usually by fine or imprisonment.”

Lord President Clyde’s dictum in JOHNSON VS GRANT 1923 SC 789 at page 790 however cautioned that:

“The law does not exist to protect the personal dignity of the judiciary nor the private rights of parties or litigants. It is not the dignity of the court which is offended. It is the fundamental supremacy of the law which is being challenged.”

The burden of proof in contempt cases is on the person who alleges and the standard of proof is beyond balance of probabilities and not beyond a shadow of doubt. I do find that the applicant has discharged the burden of proof as she has demonstrated that the respondent in contempt of court by evicting the applicant and her children from the suit land in disobedience of a court order which was clear and unequivocal.

Section 29 of of the Environment And Land Court Act Cap 12A provides that any person who refuses, fails or neglects to obey an order or direction of the Court given under this Act, commits an offence, and shall, on conviction, be liable to a fine not exceeding twenty million shillings or to imprisonment for a term not exceeding two years, or to both. In my view, section 29 of the Environment and Land Court is applicable as it envisages a penalty based on criminal or quasi criminal proceedings. I have considered the facts in this case and the relationship of the parties and do order that the respondent Paul K Chemweno, be and is hereby imprisoned for a period of one month for being in contempt of court. In the alternative the respondent to pay a fine of Kshs.50,000/=. Moreover, the plaintiff to be allowed back in the disputed property forthwith.

DATED AND DELIVERED AT ELDORET THIS 29TH DAY OF JULY, 2016.

ANTONY OMBWAYO

JUDGE