



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT KISII

CASE NO. 38 OF 2011

S O O

P O O

D O O – Minor

N O O – Minor

Suing through brother and next friend

S O O..... PLAINTIFFS

VERSUS

DEREK OTIENO OLUOCH DEFENDANT

RULING

1.The court in this matter following an interpartes hearing of the Notice of Motion dated 10th March 2011 on 12th October 2012 delivered a ruling where it granted a temporary injunction in favour of the plaintiff in the following terms:-

That there be and is hereby an order of temporary injunction restraining the defendant/respondent either by himself, agents, servants and/or anyone claiming under the defendant/respondent, from entering into, trespassing onto, cultivating building structures interfering with and/or in any other manner whatsoever, dealing with the suit land, that is, LR No. West Kasipul/Konyango/Kokal/219 and/or any portion thereof pending the hearing and determination of this suit.

2.The plaintiff by the present application dated 20th July 2015 which is the subject of this ruling seeks interalia orders that:-

1. The honourable court be pleased to cite and punish the defendant/respondent for disobeying and/or disregarding the lawful court orders issued and/or granted on 12th day of October 2012 and served upon the defendant/respondent on the 10th October, 2013.

2. Consequent to the above prayer being granted the honourable court to be pleased to issue warrants of arrest to bring the defendant/respondent before the court for committal to jail

for disobedience.

3. Consequent to prayer (2) hereinabove being granted, the court be pleased to commit the defendant/respondent to jail for a duration not exceeding six (60 months and/or such shorter period as the court may deem fit and expedient.

4. In the alternative, the court be pleased to grant an order of sequestration to attach the properties of the defendant/respondent, which properties be sold to defray the damages occasioned by the breach and/or disobedience of the lawful court orders of temporary injunction dated 12th October 2012.

5. Costs of the application be borne by the defendant/respondent.

3. The application is premised on the grounds set out on the face of the application and the affidavit sworn in support thereof by the 1st plaintiff, dated 20th July 2015. The plaintiffs' case is that this court on 12th October 2012 delivered a ruling granting an order of injunction against the defendant restraining the defendant from entering into, trespassing onto, cultivating, building structures and/or in any other manner interfering with the suit property. The plaintiff asserts that the formal order was extracted with the penal notice endorsed thereon and was personally served on the defendant/respondent on 10th October 2012. The plaintiff states the defendant despite having been served has chosen to defy and disregard the order and that the defendant on or about 13th and 14th July 2015 entered upon and commenced cultivation of a portion of the suit property in defiance of the court order. For this reason the plaintiff avers the defendant is in defiance and disobedience of the court order and thus deserves to be punished by the court.

4. The defendant filed a replying affidavit sworn on 31st March 2016 in opposition to the plaintiffs' application. By the affidavit the defendant denies that he is trespassing onto land parcel **Kasipul/Konyango Kokal/219** stating that he inherited the parcel of land from his father. The defendant indeed avers that it is the plaintiffs who have been in trespass onto the suit property and asserts that it is the plaintiffs who have constantly harassed him and his family denying him peaceful possession of the suit property. The defendant goes on to give what amounts to be the history of the dispute between him and the plaintiffs in regard to the suit land which in regard to the instant application lacks any relevance as such would perhaps be evidence to be adduced during the hearing of the application that led to the issuance of the injunctive order that it is alleged the defendant is in disobedience of.

5. The defendant's real answer to the plaintiffs Notice of Motion to the contempt application is to be found at paragraphs 14, 15 and 16 of the replying affidavit which I hereby set out hereunder for ease of reference.

14. That sometimes in July 2015 to my shock and disbelief, I learnt that way back in the year 2011 plaintiffs/applicants had launched a suit against me before this honourable court over the suit property and allegedly obtained temporary injunction orders to my detriment.

15. That prior to the foregoing i had no knowledge whatsoever of any injunctive orders being issued against me over the suit property, and that i was not served with any orders restraining me from dealing in any way on the suit property.

16. That the plaintiffs/applicants actions and omissions are deliberate to defeat the ends of justice; fact being that the plaintiffs/applicants filed the substantive suit back in the year 2011, allegedly obtained temporary injunctive orders against me on the 12th day of October 2012 only to wait until the 10th day of October, 2013 to allegedly serve me with the said orders, which is denied, and to further commence contempt proceedings against me on the 20th day of July 2015 long after lapse of the said injunctive orders.

It is thus the defendant's position that he was unaware of and was never served with the injunctive order

issued on 12th October 2012 and further that the contempt proceedings were in any event commenced long after the injunctive order had lapsed pursuant to the provisions of Order 40 Rule 6 of the Civil Procedure Rules, 2010.

6. The parties argued the plaintiffs' application dated 20th July 2015 by way of written submissions. The plaintiffs/applicants filed their written submissions on 10th May 2016 while the defendant/respondent's written submissions were filed on 12th May 2016.

7. I have reviewed the application by the plaintiff and have considered the affidavits in support and in opposition together with the annexures thereof and I have further considered the written submissions filed on behalf of the parties by their respective counsel. The issues that stand to be determined by the court are as follows:-

i. Whether the court order of 12th October 2012 was served on the defendant and/or if the defendant was aware and had knowledge of the same.

ii. Whether the court order had lapsed by virtue of Order 40 Rule 6 of the Civil Procedure Rules, 2010.

iii. Whether the defendant/respondent is guilty of disobedience of the court order and therefore liable to be punished for contempt of court.

8. Before a court of law can punish a party for contempt the court has to be satisfied that the court order complained about was served on the party sought to be cited for contempt and further that the party has deliberately disobeyed the order having full knowledge of the contents of the order. Although until recently the cardinal principle was that a party had to be personally served with the court order to be held to be in contempt of the order the courts have relaxed this principle to the extent that proof of personal service is no longer a prerequisite and presently proof that the contemnor had knowledge of the order and the contents thereof is sufficient. The earlier position was exemplified in the case of **Ochino & Another –vs- Okombo & 4 Others [1989] KLR 165** where the Court of Appeal held:

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.

9. In the following cases the courts have held that personal service of a court order is not mandatory before a party can be found to be in contempt of the order and the courts have held that being aware of and having knowledge of the contents of the order is sufficient. See **Faza Holdings Ltd T/A Down Town Hotel –vs- John Kagonye Ngururi & Another [2014] eKLR**, **Kitangila Limited –vs- Keziah Mumbi Paul & 5 Others [2014] eKLR** and **African Management Communication International Ltd –vs- Joseph Mathenge Mugo & Another [2013] eKLR**.

10. The plaintiffs/applicants in the instant application aver that the defendant was served with the extracted court order given on 12th October 2012 on 10th October 2013 and have annexed an affidavit of service by one David Okumu Oluoch sworn on 11th October 2013 marked "S002". The defendant denies

that he was served as deponed in the affidavit of service averring that he became aware of the order when he was served with the application for contempt. From the court record the ruling delivered on 12th October, 2012 granting the injunction in favour of the plaintiff was delivered in the absence of the defendant's advocate and the defendant. The affidavit of service of the order though apparently sworn on 11th October 2013 was not filed in court until the instant application was filed on 21st July 2015. In the meantime the firm of G. S Okoth & Company Advocates who represented the defendant during the hearing of the application that gave rise to the order the subject of these contempt proceedings applied and was granted leave to cease to act for the defendant ostensibly on the grounds that the defendant had not furnished him with sufficient instructions.

11. Given the divergent positions taken by the defendant and the plaintiffs on the question of whether or not the defendant was served with the court order of injunction on 10th October 2013, I find myself unable to emphatically hold that the defendant was indeed served and to the extent I entertain some doubt I have an obligation to resolve that doubt in favour of the defendant. Contempt proceedings are quasi criminal in nature where the liberty of the alleged contemnor is at risk as he could be convicted and sentenced to serve a prison term. The standard of proof therefore in contempt proceedings though not required to be on a standard of proof beyond a reasonable doubt as in criminal proceedings must be certainly on standard higher than on a balance of probabilities. In this matter the aspects that cast some doubt in my mind is that though the order of injunction was granted on 12th October 2012, it was not extracted until nearly one year later on 7th October 2013 and supposedly served on the defendant on 10th October 2013 and further though the affidavit of service was made on 11th October 2013 the same was not filed in court until 21st July 2015 when the application was filed.

12. Following the denial of service of the order by the defendant, the logical thing for the plaintiff or defendant to have done was to apply for the process server to be summoned for cross-examination in regard to the service of the order to explain how and in what manner the service was effected. As that was not done the court was left with two conflicting positions and there is no reason for the court to accept one position and not the other. Simply put, there is a doubt as to whether the service of the order was effected as stated in the affidavit of service. There is no demonstration that the defendant was infact aware of and/or had knowledge of the order before he was served with the instant application. Neither the defendant nor his advocate was present when the ruling granting the injunction was delivered. The fact that the defendant's former advocates withdrew from representing him points to a breakdown of communication between them. In those circumstances, I cannot hold that the defendant was aware of and/or had knowledge of the contents of the order granted on 12th October 2012.

13. On the basis of what I have already stated above it must have become evident by now that I cannot find or hold that the defendant has disobeyed the order of 12th October 2012 so as to be liable to be punished for contempt of the order. However, the defendant has opposed the application on a further ground that, even if the order had been appropriately served the same had lapsed by the time the acts of the defendant alleged to constitute the disobedience were committed by virtue of Order 40 Rule 6 of the Civil Procedure Rules since by July 2015 a period of more than 12 months had lapsed since the injunction was granted. Order 40 Rule 6 of the Civil Procedure Rules provides as follows:-

40(6) Where a suit in respect of which an interlocutory injunction has been granted is not determined within a period of twelve months from the date of the grant, the injunction shall lapse unless for any sufficient reason the court orders otherwise.

14. While the intention of the Rules Committee in making the above provision in the Civil Procedure Rules was to prevent parties who are granted injunction from abusing perhaps the position of advantage that they had acquired in the suit through the grant of injunction by failing to have the suits prosecuted as they sit on the injunction, the practical implementation of the subrule is not without difficult owing to the perennial case backlog and case load pending before the courts. There is case backlog in the courts so that it is not usual for the majority of the cases to be finalized within twelve months of being filed and particularly before the Environment and Land Court where literally all cases are commenced with an application for injunction. Given such scenario, the application of the subrule would not be without

difficult. Be it as it may be, in the instant case the order of injunction was granted to last pending the hearing and determination of the suit and there are indications that the plaintiff had infact taken steps towards the preparation of the suit for hearing and hence if any request for extension of the injunction would have been sought, the court would without doubt have extended the same. My own view is that Order 40 Rule 7 of the Civil Procedure Rules which deals with discharge, variation or setting aside of injunctions would adequately cater for the mischief that order 40 Rule 6 sought to address as any party who felt prejudiced by an order of injunction could invoke Rule 7 of Order 40 for the injunction to be discharged, varied or set aside.

15. In conclusion it is my finding that the defendant has not been shown to be in contempt of the court order granted on 12th October 2012 and I accordingly dismiss the plaintiffs' application dated 20th July 2015. I direct that the costs of the application shall be in the cause.

Ruling dated, signed and delivered at Kisii this 15th day of July, 2016.

J. M. MUTUNGI

JUDGE

In the presence of:

Mr. Ochwangi for the plaintiffs

N/A for the defendant

Mr. Ngare Court Assistant

J. M. MUTUNGI

JUDGE