



REPUBLIC OF KENYA

Environment And Land Court At Kisii

CASE NO. 367 OF 2015

DANIEL LEURU KALASINGA PLAINTIFF/APPLICANT

VERSUS

JAMES KAYIONI KAIKAI DEFENDANT/RESPONDENT

RULING

1. The plaintiff applicant's application for injunction was heard by the court and a ruling rendered on 6th May 2016. The court in declining to grant an injunction in the terms sought by the plaintiff directed that the parties maintain and observe the prevailing status quo on interalia the following terms:

i. The defendant was to continue to occupy the portion that he was in occupation of but was not to open any fresh land for cultivation and was not to cut any trees either on the portion occupied by him and/or any other portion of the suit property until the suit was heard and determined.

ii. No party was to sell, dispose of or transfer the suit property until the suit was heard and determined.

iii. The interim order granted on 31st July 2015 was accordingly vacated and varied in terms of (i) and (ii) above.

2. The plaintiff/applicant by a notice of motion application dated 30th May 2016 filed on 2nd June 2016 avers that the defendant/respondent has disobeyed the court orders issued by the court vide its ruling on 6th May 2016 and seeks orders that the defendant be cited and punished for contempt of court for disobeying and disregarding lawful court orders and prays that the defendant be committed to jail for a term not exceeding 6 months and/or that his properties be attached and sold to defray the damages occasioned by the breach and/or disobedience of the court orders.

3. The plaintiff's said application is premised on the grounds set out on the body of the application and on the annexed affidavit sworn in support of the application by the plaintiff/applicant on 30th May 2016. The plaintiff/applicant avers that the defendant/respondent has acted in breach of the order requiring the parties to maintain and observe the status quo in that the defendant has proceeded to open up fresh land on the suit land and has embarked on construction of new structures in the newly opened fresh land in the suit property in defiance of the court order. The plaintiff states that the formal order endorsed with a penal notice was extracted and served on the defendant on 20th May 2016. The plaintiff asserts that the actions of the defendant constitute and amount to disobedience of the court order and that the defendant deserves to be punished to uphold the dignity and respect for the court.

4. The defendant filed a replying affidavit sworn on 16th June 2016 in opposition to the plaintiff's application. The defendant states that he has not in any way disobeyed the order for observance of the status quo as directed by the court on 6th May 2016. The defendant avers that the court vide its ruling on 6th May 2016 made a finding that he had been in occupation of a portion of the suit land before the institution of the instant suit and maintained that he had neither opened fresh land for cultivation or cut any trees either on the portion he had been occupying or any other portion of the suit property. The defendant contends that the plaintiff upon obtaining the ex parte orders on 31st July 2015 razed the defendant's houses and attempted to evict him from the portion that he was occupying. The defendant's assertion is that he was merely reconstructing a place of abode on the portion that he had been occupying to replace the structures that the plaintiff had burnt and avers that the court orders of 6th May 2016 did not bar him from putting up residential structures in the portion of the suit land that he was occupying pending the determination of the suit. The defendant avers that the plaintiff is employing every imaginable means to procure the vacation of the defendant from the suit land and that the criminal proceedings instituted against the defendant at Kilgoris Magistrates Court are part of this scheme. The defendant denies he has in any manner breached or infringed the court orders issues in this matter to deserve to be punished.

5. The parties argued the application by way of written submissions. The plaintiff's/applicant's submissions were filed on 11th July 2016 while the defendant's submissions were filed on 20th July 2016. Having reviewed the plaintiff/applicant's application together with the affidavits in support and in opposition and the parties filed written submissions the issues for determination are:-

- i. What the order for observance and maintenance of the status quo entailed in regard to occupation of the suit premises.**
- ii. Whether the defendant was served and/or had knowledge of the orders issued on 6th May 2016.**
- iii. Whether there is proof that the defendant disobeyed the court order so as to be liable to be punished for such disobedience.**

6. Before a court can punish a party for disobedience of a court order the court must be satisfied the order was clear, explicit and unambiguous. The order should not be capable of being interpreted in any other manner other than what it expressly and explicitly states. The extracted part of the order that has given rise to the instant application is in the following terms:-

“The parties be and are hereby ordered and directed to maintain and observe the prevailing status quo on the following terms:-

i. The defendant shall continue to occupy the portion that he is in occupation of but shall not open any fresh land for cultivation and will strictly not cut any trees either on the portion he is occupying or any other portion of the suit property, that is, LR No. Transmara/Olomismis/1329 until the suit is heard and determined.

ii.

iii.

iv.

v.

7. While the order directed the observance and maintenance of the prevailing status quo it additionally provided the defendant would continue occupation of the portion that he was occupying. The order barred the defendant from opening any fresh ground for cultivation and from cutting any trees either in

the portion he was occupying or any other part of the suit land. The order did not bar the defendant from putting up a residential house on the portion he was occupying. The defendant states the plaintiff had razed his structures to the ground in an effort to throw him out of the suit land and hence according to the defendant he first wanted to provide his family with a habitable structure while awaiting the determination of the case. The defendant avers he was putting up the new structure on the portion that he was occupying and not on new ground.

8. In the application by the plaintiff that gave rise to the orders the subject of the present contestation between the plaintiff and the defendant what was in issue was whether the defendant was in occupation of the portion he occupied since 2011 or whether the defendant had forcibly entered occupation on or about 14th July 2015 as claimed by the plaintiff. The defendant had claimed he had been in occupation since 2011 and had constructed two houses and cattle shed and had been cultivating on the portion that he had so occupied. The court after reviewing the evidence before it came to the conclusion that the defendant had in fact been in occupation of part of the disputed parcel and in the ruling stated thus:-

12. “I have scrutinized the photographs “DLK7” annexed by the plaintiff as evidence that the defendant has cut down trees on the land. While the photographs are evidence that trees have been cut, they are not evidence of freshly cut trees. The photographs portray the picture of not some new invasion but of some “old occupation” and ground that may have even been cultivated. I do not suppose that would be the appearance if as the plaintiff claims the defendant entered into possession on 14th July 2015 and commenced cutting trees. This suit was filed on 29th July 2015 and the photographs therefore must have been taken a little earlier. In the premises I am not persuaded that the defendant indeed invaded the suit land on or about 14th July 2015 as claimed by the plaintiff. I accept the defendant’s assertion that he was in occupation of the portion of land before the institution of the instant suit. Whether or not he is lawfully in possession of the suit land in my view is a matter for determination at the trial.”

In the same ruling I further observed thus:-

15. In the instant matter as I have made a finding that the defendant was in possession and occupation of a portion of the suit land, to grant an injunction in the terms sought by the plaintiff would effectively amount to ordering the eviction of the defendant. The net result is that the plaintiff has not made out a case for grant of an injunction against the defendant in the circumstances...”

9. It is against the foregoing context that the court declined to grant the plaintiff an injunction and instead ordered the observance and maintenance of the status. **The status quo was that which existed before the plaintiff instituted the instant suit. The status quo then was, the defendant was in possession and occupation and had at least two houses thereon.** If the plaintiff razed down the houses as claimed by the defendant, the defendant was entitled to rebuild the same for habitation with his family till the suit was determined. The temporary order of injunction granted at the ex parte stage did not authorize the eviction of the defendant yet implementing the same could virtually amount to the same as it interalia was restraining the defendant from **...reentering, trespassing onto, cutting down trees, cultivating, building structures, grazing on...or in any other manner whatsoever dealing with the suit property...”**

The court being conscious of the implication of the interim order went on to observe in the ruling as follows:-

“...The court will not grant an injunction whose implementation is not practical as courts will not grant orders in vain. Where a party is or has been in possession of a parcel of land the court cannot properly grant an injunction restraining entry or possession of the land as you cannot restrain that which has already occurred.”

10. The grant of the status quo order therefore envisaged that the defendant would remain in occupation

and possession of the portion that he was occupying and would be entitled to use the same as he was using before the institution of the suit and the only limitation was that he would not claim new land and/or cut any trees. Occupation in the context of maintenance of the status quo meant the defendant would be permitted to continue living on the portion he was occupying and in my view the putting up of a structure for him and his family to live in was not inconsistent with the order. In the circumstances it is my determination that the order for observance of the status quo lacked clarity and was not express and explicit that the defendant was not to put up any structures on the portion he was occupying. The status quo that was to be observed and maintained was that which existed prior to the plaintiff filing the instant suit and such status quo was that the defendant was in occupation of a portion of the suit land and was residing thereat with his family. That is the status quo that was ordered to remain on terms until the suit was heard and determined.

11. Although the defendant had denied being served with the order on 20th May 2016 he has nonetheless admitted having been served with the order on 24th May 2016 so there is no dispute that the order was in fact served. The question whether or not there was disobedience of the order by the defendant to invite penal sanctions is of no consequence in view of what I have discussed earlier in this ruling. Having come to the conclusion that the order requiring the parties to maintain and observe the status quo lacked express clarity on the acts that the defendant was barred from carrying on in the portion that he was to remain in occupation of means that he cannot be found to have breached and/or disobeyed the order. There is no proof that the defendant deliberately and willfully sought to breach or disobey the court order and/or that by his conduct the defendant sought to obstruct justice. See the case of **Mutitika –vs- Baharini Farm Ltd 1985 KLR 227** where the court held that the standard of proof in contempt of court proceedings must be higher than proof on a balance of probabilities though not as high as proof beyond a reasonable doubt as is the norm in criminal cases. There is no proof that the defendant did in fact open new ground for cultivation outside the area he had occupied prior to the institution of the suit or that he was putting the structure in a freshly opened new ground other than that which he occupied at the time the suit was instituted.

12. In the result I find and hold that the plaintiff’s application dated 30th May 2016 is devoid of merit and I dismiss the same with costs to the defendant.

13. Orders accordingly.

Ruling dated, signed and delivered at Kisii this 7th day of October, 2016.

J. M. MUTUNGI

JUDGE

In the presence of:

..... for the plaintiff

..... for the defendant

..... Court Assistant

J. M. MUTUNGI

JUDGE