



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC NO.612 OF 2016

ELKANA SALAMBA

JOSHUA KIMKEMEI

JOTHAM MATIVA (Suing as Trustees of

PENTECOSTAL ASSEMBLIES OF GOD (P.A.G).....PLAINTIFFS

VERSUS

1. ALLAN MISIGO

2. KEN KEYA

3. GEDFREY RODENYO.....DEFENDANTS

RULING

1. The plaintiffs brought this suit against the defendants on 8th June 2016 seeking among others an order of injunction to restrain the defendants from entering upon or trespassing, constructing or continuing with the construction of any structures, offering for sale, selling, disposing of, charging, sub-dividing, dealing with, alienating, occupying, leasing, or otherwise using, residing or remaining on and or interfering in any manner howsoever with all that parcel of land known as **LR. No. 23240(I.R No.124997)**(hereinafter referred to as “**the suit property**”). The plaintiffs claimed that they are the registered proprietors of the suit property and that on 28th May 2016, the defendant without any lawful excuse entered the suit property and occupied a portion thereof on which they started putting up temporary structures. The plaintiffs claimed that they approached the defendants and inquired from them on whose authority they had entered the suit property but the defendants became violent and chased them away. The plaintiffs averred that they tried to have the dispute resolved through the area chief but the chief was unable to convince the defendants to vacate the property leaving them with no alternative but to file this suit.

2. Together with the plaint, the plaintiffs filed an application by way of Notice of Motion dated 8th June 2016 seeking a temporary injunction to restrain the defendants from entering upon or trespassing, constructing or continuing with the construction of any structures, offering for sale, selling, disposing of, charging, sub-dividing, dealing with, alienating, occupying, leasing, or otherwise using, residing or remaining on and or interfering in any manner with the plaintiff’s enjoyment and quiet possession of the suit property pending the hearing and determination of this suit. When the plaintiff’s application came up for hearing on 18th August 2016, Mr. Moindi advocate appeared for the plaintiffs while Mr. Wangira

advocate appeared for the defendants. Mr. Wangira informed the court that he needed time to respond to the application. Mr. Moindi did not object to the adjournment of the application but urged the court to grant the orders sought in the application on a temporary basis so as to preserve the suit property pending the hearing of the application inter partes. The court granted the defendants leave to file their response to the plaintiff's application within 30 days from the date of the order and fixed the application for hearing on 31st October 2016. The court also granted the plaintiffs interim orders on the following terms; **“Until then the defendants by themselves or through their servants or employees are restrained from constructing or continuing with the construction of buildings or any other structures on all that parcel of land known as LR. No.23240(I.R No.124997)”**. The orders made by the court on 18th August 2016 were extracted and sealed by the Deputy Registrar on 24th August 2016.

3. What I now have before me is the plaintiffs' Notice of Motion application dated 26th September 2016 in which the plaintiffs have sought an order for the arrest and detention in prison of the three(3) defendants for a term not exceeding two(2) years for disobeying the orders that were issued herein on 18th August 2016. In the alternative, the plaintiffs have sought an order that the defendants be convicted and fined of up to Ksh.1,000,000/= for disobeying the said court order. The application is supported by the affidavit of Reverend Charles Adenya sworn on 26th September 2016. Reverend Charles Adenya is a pastor with the Kangemi branch of Pentecostal Assemblies of God Church whose trustees have brought this suit. He has stated in his affidavit that he has authority of the plaintiffs to swear the affidavit. He has stated that on 18th August 2016, the court ordered the plaintiffs to stop construction on the suit property which order was extracted and served upon the defendants on 6th September 2016 through a process server. He has stated that despite service of the said order upon the defendants, the defendants by themselves and/or through their servants or agents continued with construction on the suit property on 17th and 18th September 2016 in defiance of the order. Reverend Charles Adenya attached to his affidavit, a copy of the order that was made by the court on 18th August 2016, a copy of the affidavit of service sworn by Peter Keli on 26th September 2016 and photographs said to have been taken on the suit property on 18th and 19th September 2016 showing the construction activities which the defendants engaged in after being served with the court order aforesaid.

4. The defendants did not respond to the application. When the application came up for hearing before me on 31st October 2016, once again, Mr. Moindi appeared for the plaintiffs while Mr. Wangira appeared for the defendants. Mr. Wangira informed the court that he had not received instructions from the defendants on the application and that is why he had not filed any response to the same on behalf of the defendants. He left the matter to the discretion of the court. In his submission in support of the application Mr. Moindi relied entirely on the affidavit of Reverend Charles Adenya that was filed in support of the application together with the annexures thereto. He submitted that the defendants disobeyed the orders made by this court on 18th August 2016 and as such the orders sought against them in the application should be granted.

5. I have considered the plaintiffs' application together with the affidavit filed in support thereof. This is my view on the matter. It is well settled that contempt of court proceedings are quasi criminal in nature because the contemnor is bound to lose his liberty if found guilty of the contempt complained of. In view of this, the standard of proof of contempt is higher than proof on a balance of probabilities. See, the holding in the Court of Appeal case of, **Mutitika-vs-Baharini Farm Ltd. (1985) KLR 227**, where the court stated that the standard of proof in contempt proceedings must be higher than proof on a balance of probability, and almost but not exactly, beyond reasonable doubt. It follows therefore that for the plaintiffs to succeed in the present application, they have to satisfy the court to a degree beyond a balance of probabilities that the defendants have disobeyed the order that was issued herein on 18th August 2016.

6. As I have stated hereinabove, the said court order of 18th August 2016 restrained the defendants from constructing or continuing with construction of buildings or any other structures on the suit property. The plaintiffs have stated that the said court order was served upon the defendants. They have produced an affidavit of service sworn by a process server of this court in which the said process server has stated how he effected service of the said court order upon the defendants. The plaintiffs have contended that the

defendants continued with construction on the suit property even after being served with the said court order. They have placed before the court photographs showing that the defendants on 18th and 19th September 2016 continued to complete the construction of the structures that they had started to put up on the suit property earlier. The defendants have not opposed the application.

7. The fact that the court issued an order on 18th August 2016 restraining the defendants from constructing or continuing with construction on the suit property is not denied. The fact that the order was served upon the defendants is also not denied. The defendants have also not denied the plaintiffs' claim that they continued with construction on the suit property after being served with the said court order.

8. Due to the foregoing, I am satisfied that the plaintiffs have proved that the defendants defied the order issued by this court on 18th August 2016 with the full knowledge of the content and purport thereof. In the case of **Hadkison –vs- Hadkinson(1952) ALLER 567**, the court stated that;-

“It was plain and unqualified obligation of every person against or in respect of whom an order was made by a court of competent jurisdiction to obey it unless and until it was discharged and disobedience of such order would as a general rule result in the person disobeying being in contempt and punishable by committal or attachment...”.

9. It is my finding therefore that the defendants are guilty of contempt of court and should be punished therefor. The upshot of the foregoing is that the plaintiffs' Notice of Motion dated 26th September 2016 has merit. In view of the nature of contempt of court proceedings, it is necessary to give the contemnors an opportunity to address the court in mitigation before a sentence is passed against them.

10. I therefore direct that the defendants be summoned to appear before this court on a date to be fixed to mitigate before the court decides on appropriate sentence to impose. The plaintiffs shall have the costs of the application.

Delivered and Dated at Nairobi this 4th day of November, 2016.

S. OKONG'O,

JUDGE.

In the presence of:-

Mr. Moindi for Plaintiffs

Mr. Serem h/b for Wangira for Defendants

Kajuju Court Assistant