



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA**

**ELC CASE NO. 21 OF 2012**

**JANE GACHUI MWANGI ..... PLALINTIFF/APPLICANT**

**VERSUS**

**NDERI MWANIKI .....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**BANARD KINYUA .....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**MURIUKI MWANGI ..... 3<sup>RD</sup> DEFENDANT/RESPONDENT**

**RULING**

This is in respect to the plaintiff/applicant's Notice of Motion dated 6<sup>th</sup> August 2014 and filed herein on 12<sup>th</sup> August 2014 seeking the following substantive prayers:-

- 1. That this Honourable Court be pleased to cite NDERI MWANIKI (1<sup>st</sup> defendant/respondent) and BENARD KINYUA (2<sup>nd</sup> defendant/respondent for contempt of Court and***
- 2. That the defendants/respondents herein be committed to civil jail for contempt for such period as the Court may deem fit.***

The said application is supported by the applicant's affidavit in which she depones that whereas on 1<sup>st</sup> March 2014 this Court made orders for the status quo on land parcel No. INOI/THAITA/1001, 1002 and 1003 to be maintained pending the hearing of this suit, the defendants/respondents have started picking tea bushes and cutting tea on the said land (hereinafter the suit land) despite being served with the Court order and therefore, in order to up-hold the dignity of the Court and the sanctity of its orders, it is just to have the defendants/respondents committed to civil jail.

The application is opposed and in his replying affidavit, the 1<sup>st</sup> defendant/respondent has deponed, inter alia, that the suit land is part of the original land number INOI/THAITA/77 which belonged to their late father MWANGI MWANIKI SOLOMON before being sub-divided and allocated among his family members. He adds that the tea bushes that it is alleged the defendants/respondents have been picking as well as the trees on the suit land belong to them and that is the status quo obtaining on the land. They are therefore not in contempt of any Court orders.

The application was argued orally in Court on 5<sup>th</sup> March 2015 with the applicant appearing in person and Mr. Wandaka for the 1<sup>st</sup> and 2<sup>nd</sup> defendants/respondents.

In the course of the oral application, the plaintiff/applicant told the Court that although the defendants/respondents were told to vacate the suit land and not work on it, they are picking her tea and

have cut her trees.

However, Mr. Wandaka submitted that the defendants/respondents were never served with any orders and in any case, the orders issued by the Court were that the status quo be maintained with each party occupying their respective portions of land and the trees and the bushes belong to the defendants/respondents. Counsel added that what the plaintiff/applicant is seeking is to evict the defendants/respondents before the suit is heard and further, there have been other suits filed in Nyeri Court over the same property.

I have considered the application, the rival affidavits and submissions by the plaintiff/applicant and Mr. Wandaka.

From the record herein, it is clear that the plaintiff/applicant filed this suit on 13<sup>th</sup> November 2012 seeking a perpetual injunction restraining the defendants/respondents from continuing to occupy or use the suit land which is registered in her names. She also sought damages for trespass. She then moved to Court on 11<sup>th</sup> March 2013 under Certificate of urgency seeking orders to restrain the defendants/respondents from interfering with her tea bushes crops, trees or occupying the suit land until this suit is heard and determined. The application was placed before Ombwayo J. on 12<sup>th</sup> March 2014 who made the following orders:-

***“Application is certified urgent. The same be served within 3 days. Status quo be maintained. Hearing on 31<sup>st</sup> March 2014 at Kerugoya”***

The order for maintenance of status quo was further extended by the Deputy Registrar Mr. W.F. Andayi on 31<sup>st</sup> March, 2014.

According to Mr. Wandaka, the status quo obtaining then and now is that all the parties herein live on their respective portions of the suit land. From her plaint, the plaintiff/applicant is the registered proprietor of INOI/THAITA/1001 but in her Notice of Motion subject of this ruling, she also includes INOI/THAITA/1002 and 1003. There is a certificate of search showing that she is the registered proprietor of INOI/THAITA/1001 but it is not clear at this stage who is the registered proprietor of INOI/THAITA/1002 and 1003. In that case, the defendant/respondent’s assertion that each of the parties herein live on their respective portions of land cannot easily be wished away. That would explain why the order of status quo was issued by Ombwayo J. on 12<sup>th</sup> March 2014. Assuming therefore, that the defendants/respondents are occupying INOI/THAITA/1002 and 1003, and that that was the status ordered by Ombwayo J., then they would not be in contempt of the Court orders issued on 12<sup>th</sup> March 2014. The order itself was not specific as to what the said status was on the ground.

Then there is the issue of service upon the defendants/respondents of the order by Ombwayo J. It is Mr. Wandaka’s submission that the said order was not served upon his clients. The law is now clear that apart from service, if it is proved that the party sought to be cited for contempt had knowledge of the order alleged to have been defied, then that will be sufficient to warrant committal to civil jail for contempt even if there is no proof of personal service upon the contemnors. There is an affidavit of service by Emmah Muchoki a process server at this Court showing that the order of Ombwayo J. was in fact served upon the 1<sup>st</sup> and 2<sup>nd</sup> defendants/respondents who acknowledged receipt by signing the same. Therefore service is not really in dispute.

However, although service is established, the order itself, as I have indicated above, was to the effect that the ***“status quo be maintained”***. According to Mr. Wandaka, the status quo then obtaining on the suit land was that each party was living on their respective portions. It is not really contested that the 1<sup>st</sup> and 2<sup>nd</sup> defendants/respondents live on part of the suit land. In that case, it would be expected that they have their own crops thereon. The standard of proof in contempt proceedings must be higher than on a balance of probabilities and almost, but not exactly, beyond reasonable doubt – ***MUTITIKA VS BAHARIN 1 FARM LTD 1985 K.L.R. 227.*** In the circumstances of this case, I am not persuaded that the plaintiff/applicant has met this standard.

I therefore dismiss the plaintiff/applicant's Notice of Motion dated 6<sup>th</sup> August 2014 with costs to the 1<sup>st</sup> and 2<sup>nd</sup> defendants/respondents.

**B.N. OLAO**

**JUDGE**

**13<sup>TH</sup> MARCH, 2015**

**17/3/2015**

**Before**

**B.N. Olao – Judge**

Gichia – CC

Plaintiff – present

Mr. Kiama for Wandaka for Defendant – present

COURT: Ruling delivered this 17<sup>th</sup> day of March 2015 in open Court.

Plaintiff present in person

Mr. Kiama for Wandaka for Defendant present.

**B.N. OLAO**

**JUDGE**

**17<sup>TH</sup> MARCH, 2015**