



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO 300 OF 2013

WILFRED ANDY CHERESPLAINTIFF

VERSUS

CHESIMET ARAP KORGORENDEFENDANT

RULING

(Application to have respondent punished for disobeying an order of injunction; Order 40 Rule 3; parties having agreed by consent to order of injunction; clear disobedience by respondent; respondent liable to be punished for disobeying order)

1. The application before me is that dated 18 September 2014 filed by the plaintiff. It is an application inter alia brought under the provisions of Order 40 Rule 3 of the Civil Procedure Rules, and principally seeks the arrest and committal to jail of the defendant, for disobeying the orders of injunction issued on 6 May 2013, 20 March 2014, and 18 June 2014. It is the contention of the plaintiff that orders of injunction were issued and served but the defendant has continued to violate the same.

2. In his supporting affidavit, the plaintiff has stated that on 2 May 2013 his application for injunction was heard ex-parte in the first instance and he was granted interim injunctive orders restraining the defendant from the land parcel CisMara/Lemek/3849 which is the subject matter of this suit. He has averred that this order was served upon the defendant together with the plaint and summons and the defendant signed at the back of it. Appearance was entered on his behalf, and when the application for injunction came up inter partes on 28 July 2013, the interim orders were extended and again served upon the defendant and his counsel. It is stated that the interim orders were again extended when the matter was mentioned on 18 March 2014 and finally issued on 20 March 2014. It is averred that on 7 April 2014, counsel for the plaintiff and defendant recorded a consent extending the interim orders until the conclusion of the suit. It is said that this order was extracted and served on both defendant and his counsel. Despite this, the plaintiff has deposed that the defendant continues being in the suit property in disobedience of the order of injunction and has embarked on cultivating the land. It is also deposed that the defendant has continued to threaten the life of the plaintiff and has said that no one can stop him from utilizing the suit property, not even the orders of this court. To his affidavit, the plaintiff has annexed various affidavits of service to demonstrate that the orders mentioned were duly served.

3. The defendant has responded to the application by filing a replying affidavit. He has stated that the land parcel Cis Mara/Lemek/3849 is an illegal creation out of an unlawful sub-division of the land parcel Cis-Mara/Lemek/11. He has stated that at no time has the plaintiff been in possession of the land and that it is himself (defendant) who has been in occupation. He has averred that he has done nothing towards the sale of the land and has maintained the status quo as per the orders of the court. He has deposed that he has

been informed by his advocate, Mr. Kenani, that when he appeared in court, it was agreed that the status quo on the ground be maintained and that this position has not changed. He has mentioned a case Nairobi HCCC No. 1155 of 2002 *Manywele Korgoren vs Chesimet Korgoren & Another*, and has averred that in the said case, preservation orders for the suit property were granted. He has deposed that in the said suit, the court therein annulled the sub-division of the land parcel Cis Mara/Lemek/11 and that the creation of the land parcel No. 3849 was therefore unlawful.

4. He has stated that through Kenya Gazette Notice No. 4548 the creation of the suit property as a sub-division of the land parcel No. 11 was cancelled. He has refuted having signed the injunctive orders of this court as alleged by the plaintiff. He has also referred to an affidavit of service deposed on 7 April 2014 showing that the law firm of M/s Kenani & Company Advocates were served with orders, and stated that the affidavit shows that the order was served on one Cate, yet Mr. Kenani has informed him that there is no one by the name of Cate in his office. It is his view that this application seeks to delay the prosecution of this suit, and for the applicant to take advantage to use the orders, so as to take possession of the property which he has never had. He has averred that if the applicant is successful in his pursuit, the same will result in rendering ineffective the judgment in Nairobi HCCC No. 1155 of 2002.

5. Before the hearing of the application on 6 July 2015, the defendant filed an application dated 27 May 2015 seeking to reverse the orders of injunction. I directed that the application herein be heard first.

6. In his submissions, Mr. Yoni for the applicant, inter alia stated that there is clear disobedience of the orders of injunction, and that the defendant has not denied being in disobedience. Mr. Kenani for the defendant submitted that the applicant has not shown what orders the respondent is in contempt of. He submitted that the plaintiff has not shown that he has ever been in possession of the suit property. He also submitted that the defendant has deposed that he was never served with the said orders and that the signatures in the returns of service were not his. He stated that what the court issued was an order of status quo and that the status quo is that the defendant has been in possession of the suit property. He contended that it has not been proved that there was any disobedience.

7. I have considered the application. This application is brought pursuant to the provisions of Order 40 Rule 3 which states as follows :-

Consequence of breach [Order 40, rule 3.]

(1) In cases of disobedience, or of breach of any such terms, the court granting an injunction may order the property of the person guilty of such disobedience or breach to be attached, and may also order such person to be detained in prison for a term not exceeding six months unless in the meantime the court directs his release.

(2) No attachment under this rule shall remain in force for more than one year, at the end of which time, if the disobedience or breach continues, the property attached may be sold, and out of the proceeds the court may award such compensation as it thinks fit, and shall pay the balance, if any, to the party entitled thereto.

(3) An application under this rule shall be made by notice of motion in the same suit.

8. The above outlines the consequences of breaching an order of injunction. I therefore first need to be satisfied of three things being :-

(i) Was there an order of injunction ?

(ii) Was the defendant aware of the said order ?

(iii) Was there breach of the said order ?

Issue 1 : Was there an order of injunction ?

9. The plaintiff has deposed that various orders of injunction were issued. According to the defendant, only an order of status quo was made. I therefore need to satisfy myself on what the record reflects.

10. The record shows that the suit herein was commenced on 12 April 2013. Together with the plaint, the plaintiff filed an application under Order 40 Rule 1 (2) and sought a temporary injunction pending inter partes hearing of the application and later pending hearing of the suit. The matter first came to court on 2 May 2013, when Waithaka LJ, granted prayers 1 and 2 of the application. Prayer one was for the matter to be certified as urgent and prayer 2 was drawn as follows :-

That a temporary injunction be issued pending the hearing and determination of this application, restraining the defendant/respondent by himself, his employees, agents and any other person working under his authority from wasting, damaging, alienation, sale, removal or disposition of all that piece of land situate in Naroik known as CisMara/Lemek/3849 measuring approximately 2.02 hectares otherwise known as the suit property or in any way interfering with the quiet enjoyment, use, possession and occupation of the suit property by the plaintiff/applicant.

11. The injunction above was granted for 14 days. The matter was then scheduled for inter partes hearing on 16 May 2013. On that day, Mr. Nyamiaka held brief for Mr. Kenani for the defendant and sought 30 days to file a replying affidavit. Ms. Mureithi for the plaintiff applied for extension of the interim orders and Mr. Nyamiaka had no objection. The interim orders were then extended until 25 July 2013. On 25 July 2013, Mr. Mogere held brief for Mr. Kenani for the defendant and Ms. Said was present for the applicant. Ms. Said sought leave to file a supplementary affidavit and Mr. Mogere had no objection but sought leave to file a further affidavit if need be. The court directed that the matter be mentioned on 5 December 2013 and extended the interim orders. The matter was mentioned before Justice Emukule on 5 December 2013 and interim orders extended to 18 March 2014. On that day the matter was mentioned before Justice R.P.V Wendoh and interim orders were extended to 7 April 2014. On that day, the matter was placed before Lady Justice Waithaka. Mr. Kenani was present for the defendant and Mr. Aim was present for the plaintiff. The following is what proceeded on the day.

Mr. Aim : There are interim orders in place, The plaintiffs are in possession and occupation of the suit property. If this position can be maintained we can take directions and set down the matter for hearing.

Mr. Kenani : I agree.

Court : 1. By consent interim orders to be in place until the suit is heard and determined. The application dated 12/4/2013 is therefore compromised. Parties also have complied with Order 11. Hearing of the suit on 7 July 2014.

12. I do not think there can be debate that there were orders of injunction issued in the first instance on 2 May 2013, and which were extended on various occasions without objection by counsel for the respondent. Indeed, the record of 7 April 2014, which I have set out above speaks for itself. It was agreed by Mr. Kenani for the respondent, that the plaintiff is in possession and occupation of the suit property, and that this position can be maintained pending hearing of the suit. It is that concession by Mr. Kenani which obviated the need to hear the application for injunction. The interim orders were confirmed to stay in place until the suit was determined. The only interpretation one can give the above is that the defendant was barred from being on the suit premises until the suit herein is heard and determined.

13. I have not seen any record, where the court stated that status quo be maintained, as alleged by Mr. Kenani. I am not therefore in doubt that orders of injunction were issued stopping the defendant from interfering with the suit property.

Issue 2 : Was the defendant aware of the order ?

14. The applicant contends that the defendant was duly served with the order and signed on it. He annexed various affidavits of service. The defendant has refuted his signature and stated that the same is a

forgery. There is an affidavit of service filed on 16 May 2013, sworn by Morris Ajwang Akuku, a court process server. He has deposed that he served the initial order together with the plaint and summons. He was accompanied by the OCS Mulot Police station. He has deposed that he served the summons and the order and the defendant signed them. This was on 9 May 2013. A notice of appointment of advocate was entered on 14 May 2013 vide which M/s Kenani & Company Advocates were appointed by the defendant. It will be noted that on 16 May 2013, Mr. Nyamiaka held brief for Mr. Kenani and had no problem with extension of interim orders.

15. I find it hard to believe the defendant when he says that he has never been served. If indeed he was not served, then how did counsel get to be appointed, and how did counsel get instructions on the interim orders ? He must have been duly served and that is how counsel came on record and recorded his instructions on the interim orders. 16. The respondent never applied to cross-examine the process server, if indeed he had a serious queries to raise on the affidavits of service. I am persuaded that the respondent was duly served with the order and was aware of the same.

16. In any event, the final order of injunction was by consent of the parties and the defendant, having given instructions for the said consent, must be deemed to be aware of the orders.

Issue 3 : Has there been disobedience of the orders of injunction ?

17. The respondent himself admits being on the suit property and making use of it. He in fact does not refute disobeying the orders of injunction. He has only tried to justify his disobedience by stating that the land in issue was improperly created and that the plaintiff does not have good title to it. That to me is irrelevant. What is relevant is whether an order was issued and whether it was disobeyed. I need not press the issue of whether there is disobedience since it is admitted.

Decision

18. It doesn't matter what the respondent thinks of the plaintiff's case. The respondent will have his day in court to explain his defence. The fact that he thinks that the plaintiff has no case does not give him any justification to disobey the orders of injunction. Court orders are not given in vain and every person has a duty to obey the same. If we develop a culture of disobedience, this will be recipe for anarchy. All persons must obey the rule of law which involves obedience of court orders.

19. I have no hesitation in finding that the defendant has been in disobedience of the orders of injunction issued herein. All that remains is for me to pass the appropriate punishment. I will proceed to do so after hearing the mitigation of the defendant.

20. This application is therefore allowed with costs.

It is so ordered.

Dated, signed and delivered in open court at Nakuru this 14th July 2015.

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU

In presence of : -

Mr Opondo for the plaintiff/applicant

Mr Kenani for defendant/respondent

Janet : Court Assistant

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU

Further order

Having considered the mitigation of the defendant, he is hereby sentenced to 3 months in prison, unless in the meantime, the defendant makes an application indicating willingness to comply with the court order, and giving steps on what he intends to do to purge his contempt.

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU

14/7/2015