



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
LAND AND ENVIRONMENTAL DIVISION
ELC CIVIL SUIT NO.995 OF 2012

MARY NJAMBI MWANGI... ..1ST PLAINTIFF

VERSUS

PAUL MBOGO KARANJA..... 1ST DEFENDANT

JOHN KIRAGU KARANJA..... 2ND DEFENDANT

RULING

The plaintiff by a plaint filed on 10th December 2012 states that she and the Defendant are sister and brother in law both occupying and residing on their father's land situated in Dagoretti Waithaka. It is stated that the late **Francis Karanja Kigundu** died intestate leaving the plaintiff and the defendant in his land where they live todate.

The Plaintiff in the plaint under paragraph 5 states that when the father in law died the defendant started threatening the plaintiff and swearing that the plaintiff would not inherit her father's land since the plaintiff's husband, **Josphat Ndungu Karanja** who is the defendant's brother had passed on leaving her with two children. The plaintiff's prayers in the plaint are firstly for a permanent injunction to restrain the defendant from collecting rent from his father's land and secondly an injunction to stop the Defendant from interfering with the plaintiff's quiet environment and possession of her entitled piece of land and to allow subdivision and/or sharing equally the properties by the relevant authority to the benefit of all other members of the family.

The plaintiff further prays for an order that the defendant do produce the status report and all the original documents pertaining the deceased to the plaintiff and all relevant title documents to his property. The plaintiff also prays for general damages.

I have set out the brief particulars of the plaint to contextualize the subsequent applications dated 5th August 2013 which sought to have one **John Kiragu Karanja** enjoined as an interested party and the application dated 23rd September 2013 stated to be filed for and on behalf of the plaintiff and the interested party which sought to have the defendant cited for contempt of court in regard to the court order made by the court on 19th August, 2013 pending the hearing of the application by the interested party dated 5th August, 2013. The order made by the court on 19th August 2013 based on the application of 5th August, 2013 was as follows:-

“That pending the hearing of this application the plaintiff’s and the interested party’s houses on the suit property are not to be demolished.

In an interesting twist of events by a Notice of change dated 23rd September 2013 **John Kiragu Karanja**, the intended party filed a notice to act in person and on the same date also filed a Notice of withdrawal of his application dated 5th August 2013. The notice read as follows:-

“TAKE NOTICE that John Kirangu Karanja the interested party herein wishes to wholly withdraw his application dated 5th August, 2013”.

The effect of this notice of withdrawal was to render the court order given on 19th August 2013 spent as the same was to remain valid until the application dated 5/8/2013 was heard on 24/9/2013. Thus when **Mr. Laichena Advocate** appeared before the court on 24/9/2013 he did not have the instructions of the intended party to act for him and the application of 5/8/2013 had ceased to exist the same having been wholly withdrawn.

The firm of **Laichena Mugambi & Company Advocates** stating to act for the plaintiff and the interested party filed the Notice of Motion dated 23rd September 2013 on 24th September 2013. As at 24th September 2013 the interested party had withdrawn instructions from the said firm and thus the application could not have had his blessings. In the application the plaintiff seeks to have the Defendant cited and punished for contempt for disobeying the court order issued on 19th August 2013.

The Defendant filed a replying affidavit sworn on 30th September 2013 opposing the application and specifically denied disobeying the court order stating he works in Western Kenya and that he was not responsible for any demolition or burning of any belongings of the plaintiff. The Defendant further stated that he has never been served with any order emanating from the court.

The parties filed written submissions through which they articulated their respective positions. The plaintiff/Applicant by her submissions maintains that the Defendant breached the court orders of 19/8/2013 made in the presence of his advocates and served on him by demolishing the applicants house. The Defendant in response states in his submissions that he did not either by himself or through any agents demolish the plaintiffs house and that the court order of 19th August 2013 was never personally served upon him and no evidence of service of the order on the Defendant has been tendered by the applicant. The Defendant also submits that the subject matter relates to the estate of their deceased father and that the law relating to succession ought to be the appropriate and applicable law. It is not clear why the plaintiff did not choose to pursue the matter by way of instituting a succession cause.

I have reviewed and considered the instant application by the plaintiff and I have reviewed the pleadings giving rise to the application and the material placed before the court by the parties. On the issue of whether or not the Defendant is in contempt of the court order issued on 19th August 2013 it is my view that any orders that had been given pending the hearing of the application dated 5th August 2013 ceased to have any effect once the applicant of the application dated 5th August 2013 elected to withdraw the application since after the withdrawal of the application there was no application to be heard that the orders could crystallize having regard to the fact that the orders were given pending the hearing of the now withdrawn application.

There is further no evidence that the order of 19/8/2013 was personally served upon the Defendant accompanied and/or endorsed with a penal notice notifying the recipient that disobedience of the order could lead to penal sanctions. A court of law will not punish a party for contempt unless it is proved that the court order alleged to be breached was personally served on the contemnor and a penal notice was endorsed on such order. The contempt has also to be established to a standard more or less equivalent to beyond a reasonable doubt as punishing for contempt literally amounts to depriving the contemnor of his personal liberty and thus the standard of proof ought to be such as would be required in criminal cases.

The applicant in my view has not demonstrated that the order together with a penal notice was personally served on the Defendant or that the Defendant is the person who carried out the alleged demolitions. In the premises the Defendant cannot be held to be in contempt and thus liable to be punished.

The cases of **Mwangi H.C Wangonde –vs- Nairobi City Commission (Civil Appeal NO. 95 of 1988)** and **Kariuki & 2 others – vs- Minister for Gender, sports, culture and social services & 2 others KLR 2004 588** referred to the court by the Defendant are explicit on the question of service of the order with a penal notice and the procedure to be adopted by a party while applying to bring contempt proceedings. Leave to institute contempt proceedings is a prerequisite under the provisions of section 5(1) of the Judicature Act, cap 8 Laws of Kenya and to the extent that no leave was sought and obtained by the applicant before the contempt proceedings were commenced the application dated 23rd September 2013 is incompetent and fatally defective.

In the premises it is my finding and holding that the plaintiff’s application dated 23rd September 2013 lacks any merit and the same is ordered dismissed. This matter involves members of the same family and in exercise of my discretion I direct that each party bears their own costs for the application.

Ruling dated signed and delivered this.....**27th**.....day of.....**June**.....2014

J.M. MUTUNGI

JUDGE

In presence of:

.....For the Plaintiff

..... For the Defendants