



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: ASIKE-MAKHANDIA, P. KIAGE & O. ODEK, J.J.A)

CIVIL APPEAL NO. 111 OF 2016

BETWEEN

PHELESIA ADOYO OTIENO.....1ST APPELLANT

MOSES AYAGA ADHINGA.....2ND APPELLANT

AND

DAVID OUMA OKORE.....1ST RESPONDENT

NORAH ADHIAMBO ODHIAMBO.....2ND RESPONDENT

(An appeal from the Ruling of the Environment and Land Court of Kenya

at Kisumu (S.M. Kibunja, J), dated 09th November, 2016

in

ELC Case No. 159 of 2014)

JUDGMENT OF THE COURT

The respondents filed a Complaint dated 10th June 2014 at the Environment and Land Court claiming that the 1st respondent had fraudulently transferred parcel number KISUMU/EAST SIDHO/1844 (suit property) to himself. The ownership of the said parcel had accrued to the respondents by transmission pursuant to the death of the late Ludia Sigu Nyalianga. Not only did the 1st respondent allegedly fraudulently transfer the suit property to himself she disposed of her fraudulent interest to the 2nd appellant to the detriment of the appellants. The appellants therefore craved the court's protection by seeking among others, a cancellation order and a permanent injunction.

Simultaneously, the respondents filed a Notice of Motion of even date under certificate of urgency which sought for an interim injunction. The respondents got a reprieve through an order dated 23rd June 2014 which granted them the interim injunction they had sought restraining the 2nd appellant by himself, his servants, agents or any other person purporting to derive authority from him from entering into and remaining in, or in any other manner interfering with the respondent's quiet possession and enjoyment of the suit property.

The 1st respondent claiming that the injunction order had been defied, filed a Notice of Motion dated 6th July 2016, seeking the following orders;

- a) That the court do issue summons and or warrants of arrest to secure the appearance of the 2nd appellant.
- b) That the court be pleased to find that the 2nd appellant is in contempt of court for disobeying the court orders issued on the 23rd June 2014.
- c) That the court be pleased to commit the 2nd appellant to civil jail for a period of 6 months and or any punishment or deems fit and just under the circumstances.

The 1st respondent swore the supporting affidavit and averred that the 2nd appellant was served with a copy of the court order dated 23rd June 2014. An affidavit of service dated 2nd July 2014 was attached as proof indicating that he was personally served with the order on 30th June 2014, together with summons to enter appearance, Plaintiff, Verifying Affidavit, Plaintiff's statement, Plaintiff's list of witnesses and list of documents, Notice of Motion under certificate of urgency, its Supporting Affidavit and annexures, as sworn by the licenced process server. That the 2nd appellant disregarded the said order, entered and ploughed the suit property and planted sugar cane which was about 8 to 12 months old at the time the application was filed. This was confirmed by a letter from the Chief of Sidho East 11 sub-location via his letter dated 29th June 2016.

The 2nd appellant opposed the application stating that no order had ever been served on him nor his Advocate save for the 1st order which was served together with the Plaintiff. He claimed that the respondents had been extending orders and not serving the said orders on his Advocates or himself. Based on that he urged the court to strike out the application as no contempt had been committed.

During the hearing of the application, the learned Judge S.M Kibunja, considered the submissions and evidence presented before the court and concluded that the 2nd appellant was in contempt of court. He delivered his ruling dated 9th November 2016, cited the 2nd appellant for contempt of court and ordered for warrants of arrest to be issued against him.

Disgruntled with the ruling, the 2nd appellant has filed the instant appeal containing 4 grounds complaining in summary, that the learned judge erred in law by;

- a) Holding that the 2nd appellant was in contempt of court yet the said orders were issued in the absence of the 2nd appellant and his Advocate plus the subsequent extensions of the same.
- b) Relying on the Assistant Chief's report on the age of the crops which form the basis of the contempt.
- c) Holding that the 2nd appellant was in contempt of court yet the orders had lapsed on 29th July 2014 and were not capable of extension.

During the hearing of the appeal, **Mr Ngala Awino** appeared for the 2nd appellant, while **Mr Michael Achola** appeared for the 1st respondent. Both parties had filed written submissions and both Counsel elected not to highlight the same.

It was submitted by Counsel for the 2nd appellant that when the matter came up before the court on 09.07.2014 before E. N Maina, J it was ordered that the interim orders be extended until 29.07.2014, when the matter was to be mentioned before Kaniaru, J. That on the said 29.07.2019 the matter was not placed before any judge and therefore the same lapsed. The extension orders issued on the 30.07.2014 were erroneous as there were no orders available for extension. In any case, the same was supposed to have been served on the 2nd appellant as he was absent in court because he was not aware of the abrupt change of dates as he was not served with a notice of the same.

Further, the letter from the Chief that was relied upon by the court was prepared in anticipation of the respondent's application for contempt and therefore not a reliable document. The Assistant Chief was not endowed with the competence for crop assessment. His opinion in an area where he was limited in knowledge "amounts to a violation of **Section 48 of the Evidence Act**" and hence inadmissible. Counsel argued that had the Chief sworn an affidavit then he would have been accorded an opportunity to cross-examine him, absence of which occasioned the 2nd appellant the prejudice of lack of a fair hearing. He concluded by contending that the respondents failed to prove their case to the required standard and urged the Court to allow the appeal and set aside the ruling of the trial court.

In opposing the appeal, Counsel for the 1st respondent submitted that the interim orders still existed since the inter-partes hearing of the application dated 10th June 2014 was still pending. The extension of the said orders on 30th July 2014 was therefore in order. Moreover, since the matter was coming up for an inter-partes hearing on the same day as the application of 10th June 2014, the Advocate for the 2nd appellant ought to have been present.

The order having been served, there was no need for the 2nd appellant to be served each time the same was extended. Further, the 1st respondent proved that the 2nd appellant interfered with the suit property by planting sugar cane and the letter from the chief was used as evidence of such interference so the issue of his expertise does not arise. The learned Judge did not err in citing the 2nd appellant for contempt of court and Counsel urged us to dismiss this appeal as it lacked merit.

From the record of appeal and the submissions made before us, the issues for our determination are whether there were orders available for extension and whether the 2nd appellant disobeyed them in contempt of the court. Contempt of court is defined in **Section 4 of the Contempt of Court Act** as:

(1) Contempt of court includes —

(a) civil contempt which means willful disobedience of any judgment, decree, direction, order, or other process of a court or willful breach of an undertaking given to a court;

The issue before us is that the 2nd appellant wilfully disobeyed the court order dated 23rd June 2014 that restrained him from entering and or interfering with the suit property in any way. The 2nd appellant's defence is that the said orders lapsed on 29th July 2014. From the record, it is clear that the orders were extended by Maina, J on 09.07.2014 till the 29.07.2014 when the matter was to be heard next. However, the matter was heard a day later on 30.07.2014 by the same Judge who extended the orders further. We find that failure to mention the matter on

the 29.07.2014 did not occasion the lapse of the orders. Further on 24.09.2014 it shows on record that an Advocate by the name Kooko was holding brief for Mr Awino and on 06.11.2014 an Advocate by the name Ms Ngala held brief for Mr Awino. Both Counsel did not object to the extension of the interim orders. Neither did they raise the issue about the lapse of the orders on the 30.07.2014. Therefore this ground lacks merit and fails.

The next issue is whether the 2nd appellant was in contempt of court. We shall carefully consider the facts before making an independent finding in line with what was stated by this Court in **WOBURN ESTATE LIMITED V MARGARET BASHFORTH [2016] eKLR;**

“We reiterate that contempt proceedings being of quasi –criminal in nature and since a person may lose his right to liberty, each stage and step of the procedure must be scrupulously followed and observed.”

From the record, it is clear that the interim orders issued on 23rd June 2014 were personally served on the 2nd appellant on 30th June 2014. The said orders expressly prohibited him from entering or interfering with the suit property. From the evidence on the record, it is clear that while fully aware of their existence, the 2nd appellant wilfully disobeyed the court orders, ploughed the land, and planted maize. The Assistant Chief of the area confirmed the same in his letter and the 2nd appellant did not adduce evidence to controvert the same. His defence was a mere denial lamely offering that the said order was not served upon him as he was only served with the Plaintiff. According to the affidavit of service however, that Plaintiff was served on him together with the order.

The 2nd appellant also claimed that the extended orders were not served on him and therefore he was not in contempt of court. We find that his defence did not raise any reasonable ground for the learned Judge to believe that he was not wilfully in contempt of court. It is clear that the 2nd appellant knowingly and wilfully disobeyed a court order and tried to justify it by crafting rules for himself based on assumption and attempted to make himself the judge of his own fate. We must reiterate the seriousness with which this Court treats disobedience of court orders. As was expressed by this Court in **FRED MATIANG’I THE CABINET SECRETARY, MINISTRY OF INTERIOR AND CO-ORDINATION OF NATIONAL GOVERNMENT V MIGUNA MIGUNA & 4 OTHERS [2018] eKLR;**

“When courts issue orders, they do so not as suggestions or pleas to the persons at whom they are directed. Court orders issue ex cathedra, are compulsive, peremptory and expressly binding. It is not for any party; be he high or low, weak or mighty and quite regardless of his status or standing in society, to decide whether or not to obey; to choose which to obey and which to ignore or to negotiate the manner of his compliance..”

We will continue to set our face firmly against the culture of contumacy and will not provide succour to those who deem it a light thing to disobey or disrespect court orders with imprudence.

Thus, we concur with the learned Judge that the 2nd appellant was in contempt of court and should be arrested as per the order of the court. In consequence, this appeal lacks merit and is hereby dismissed with costs.

DATED and delivered at Kisumu this 31st day of January, 2020.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

OTIENO ODEK

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JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR.