



**IN THE COURT OF APPEAL**

**AT EDORET**

**(CORAM: E. M. GITHINJI, HANNAH OKWENGU & J. MOHAMMED, JJA.)**

**CIVIL APPLICATION NO. 11 OF 2017**

**BETWEEN**

**JAMES C. BOIT.....APPLICANT**

**AND**

**JABER MUHSEN ALI.....FIRST RESPONDENT**

**CHELUGOI MOHSEN ALI.....SECOND RESPONDENT**

***(Application for contempt of Court against the respondents; of the orders granted on 13<sup>th</sup> March, 2014***

**in**

**CIVIL APPLICATION NO. 289 OF 2014 (UR 215/2014)**

**\*\*\*\*\***

**RULING OF THE COURT**

**[1]** What is before us is a notice of motion dated 25<sup>th</sup> January 2017 that has been lodged by **James C. Boit** herein referred to as the applicant. The motion has its origin in Eldoret Environment & Land case No. 200 of 2012 in which the applicant was a defendant while **Jaber Muhsen Ali** and **Chelugoi Mohsen Ali** the 1<sup>st</sup> and 2<sup>nd</sup> respondents herein, were the plaintiffs. The suit which involved a dispute over land (*hereinafter referred to as the suit property*) was determined against the applicant and orders issued for his eviction from the suit property. Being dissatisfied with the judgment the applicant lodged Civil Appeal No 7 of 2015. The applicant also filed Civil Application No. 289 of 2014 (*UR 215/2014*) for orders of stay of execution of the judgment pending the hearing of Civil Appeal No 7 of 2015.

**[2]** On 13<sup>th</sup> November 2014, Civil Application No. 289 of 2014 was settled when the Court adopted a consent agreed upon by the parties, and made orders as follows:

- 1. That application dated 28<sup>th</sup> October, 2014 is allowed as prayed on condition that the applicant will deposit a suitable security for Kshs. One Million by way of either bank guarantee, insurance bond, or real estate, mutually acceptable to both parties, within the next 30 days;**
- 2. The appellant to file and serve the record of appeal within the next 90 days;**

3. *The appeal to be set down for hearing before the end of 2015;*

4. *Costs shall be in the appeal;*

5. *There shall be liberty to apply.*

[3] In the motion now before us, the applicant seeks to have the respondents cited and or held in contempt of the order of 13<sup>th</sup> November 2014, maintaining that the respondents have been in breach of those orders by interfering with the suit property by erecting a fence, putting up structures, ploughing, leasing out part of the suit property to strangers, and bringing goats to graze, thereby interfering with the applicant's quiet possession of the suit property.

[4] In response to the motion, the respondents have filed grounds of objection. The 2<sup>nd</sup> respondent has also filed two replying affidavits. In brief, the respondents maintain that it is the applicant who has failed to comply with the order of 13<sup>th</sup> November 2014 by failing to provide the required security; failing to serve the record of appeal within 90 days; and failing to set the appeal down for hearing before the expiry of 2015 as required in the order. The respondents argued that the application is intended to defeat the hearing of the Civil Appeal that had already been fixed for hearing.

[5] In arguing the application, learned counsel for the applicant, **Mr. Aseso**, maintained that the respondents were in contempt of the Court order, as they have moved into the suit property, destroyed the applicant's crops, and have started ploughing the suit property. Counsel argued that the respondents had personal knowledge of the order of the Court; and that the first respondent has not personally filed any response to the applicant's contention. The Court was therefore urged to allow the application.

[6] Learned Counsel, **Dr. Chebii** who appeared for the respondents pointed out that the consent adopted by the Court was a conditional order, and that the applicant not having complied with the conditions and not having sought indulgence from the Court for extension of time to comply with the order of 13<sup>th</sup> November, 2014, the order is spent and therefore the respondents were not in contempt. Further, counsel argued that the service of the application was not properly done as the respondents were not personally served. Finally, counsel urged the Court to dismiss the application as the threshold for proof in contempt proceedings had not been met.

[7] We have considered the application, the submissions made by the parties, and the authorities cited. We note that the 1<sup>st</sup> respondent has to some extent not denied entering into the suit property and tilling the land. The 1<sup>st</sup> respondent has also admitted engaging in extracting water from the land. The issue before us is simple and that is whether the respondents have acted in a manner that is contrary to the order of the Court made on 13<sup>th</sup> November, 2014. An examination of that order, which is produced above, (*Paragrah 2*) shows that the order had three conditions. First, the applicant was required to deposit a suitable security for Kshs. One Million within 30 days. Secondly, the appellant was required to file and serve the record of appeal within 90 days and thirdly, the applicant was to ensure that the appeal is set down for hearing before the end of 2015.

[8] In regard to the requirement for deposit of security, the applicant annexed to his further affidavit that was sworn on 22<sup>nd</sup> February, 2017, a copy of bank guarantee executed on 8<sup>th</sup> December 2014 by Housing Finance of Kenya Limited in favour of the respondents for payment of Kshs. One Million on behalf of the applicant. This document has not been denied by the respondents. Instead a further affidavit was sworn by the 1<sup>st</sup> respondent in which he averred that the bank guarantee ought to have been renewed for the period of the case. In our view, the bank guarantee executed on 8<sup>th</sup> December, 2014 met the requirement of the order of the Court dated 13<sup>th</sup> November, 2014 in so far as it was made within the required 30 days. The issue of renewal of the bank guarantee was a subsequent issue that was not addressed by the Court. It could not therefore vitiate the order made on 13<sup>th</sup> November, 2014.

[9] As regards the issue of filing and serving the record of appeal, the applicant has demonstrated that

the record of appeal was filed on 11<sup>th</sup> February, 2013 but service on the respondents advocate was effected on the 18<sup>th</sup> February, 2015. Therefore although the document was filed within the required 60 days, service on the respondent was effected a few days after the 60 day period. We find that the respondents are not being sincere in relying on this late service at this late hour. The fact is that the document was filed in time. The late service did not cause any prejudice and is one that can be condoned in the interest of substantive justice.

**[10]** With regard to the requirement for the appeal to be set down for hearing before the year 2015, it has not been shown that the applicant acted in a way that made it difficult to have the appeal set down for hearing. Strictly speaking, the applicant having filed the record of appeal, it was for the Court to set the matter down for hearing. In our view, the applicant substantially complied with the order of 13<sup>th</sup> November, 2014. The order of stay of execution therefore, remained in force and the respondents were obliged to comply with it.

**[11]** The next question is whether the respondents were in contempt of the Court order of 13<sup>th</sup> November, 2014 and whether they should be cited for contempt. In this regard, it is necessary for us to revisit again the content of the order of 13<sup>th</sup> November, 2014 as set out in paragraph 2 above. The order allowed the application dated 28<sup>th</sup> October, 2014 as prayed. The application dated 28<sup>th</sup> October, 2014 was unfortunately not included in the bundle of documents for the notice of motion. However, it is apparent from the grounds on the face of motion and the affidavits in support of the motion that the judgment dated 31<sup>st</sup> July, 2014 that was sought to be stayed, ordered the eviction of the applicant from the suit property. Therefore, the order of 13<sup>th</sup> November, 2014 essentially restrained the respondents from evicting the applicant from the suit property.

**[12]** The question that we must then address is whether the respondents' alleged action of entering into the suit property, erecting a fence therein, putting up structures for engagement in agri business and leasing out the suit property to strangers, amounted to eviction of the applicant from the suit property, or are so contrary to the order of 13<sup>th</sup> November, 2014, as to be considered flagrant disobedience of the order.

**[13]** We find that the applicant has not in his affidavit or grounds in support of the motion deposed to having been evicted from the suit premises. The actions of the applicant may have made his stay on the property uncomfortable, however, they do not amount to flagrant disobedience of the order of 13<sup>th</sup> November, 2014. Moreover, it is evident that no attempt was made to serve the respondents personally with the order of 13<sup>th</sup> November, 2014. Such service was necessary to serve as a warning to the respondents that they risk being cited for contempt of the Court orders. Without any attempt having been made at service, the applicant cannot impute the knowledge of the respondents' counsel to the respondents.

**[14]** We come to the conclusion that although the respondents' actions are inconsistent with the order of 13<sup>th</sup> November, 2014, they do not amount to eviction of the applicant such as to justify the respondents being cited for contempt of court. Moreover, the appeal has now been heard and is pending for judgment. It is therefore important that the parties await the substantive determination of the appeal. Until that appeal is determined, the applicant is entitled to remain on the suit property and this is still the position.

**[15]** For the above reasons, we come to the conclusion that we must dismiss the applicant's motion dated 25<sup>th</sup> January, 2017 and order each party to bear their own costs.

We make orders accordingly.

**Dated and delivered at Eldoret this 27<sup>th</sup> day of July, 2017**

**E. M. GITHINJI**

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**JUDGE OF APPEAL**

**HANNAH OKWENGU**

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**JUDGE OF APPEAL**

**J. MOHAMMED**

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**JUDGE OF APPEAL**

*I certify that this is a true copy of the original.*

**DEPUTY REGISTRAR**