



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MARAGA, AZANGALALA & KANTAI JJ.A)

CIVIL APPLICATION NO. 69 OF 2014 (UR NO.48/14)

BETWEEN

CHARLES ASIKOWA OKOLO.....APPLICANT

AND

EMKOS COMPANY LIMITED.....RESPONDENT

(An application for stay and leave to harvest food crops, deteriorating and being wasted on L.R No. 8994/20 I.R 57774 situated South East of Kitale Municipality pending the Lodging and Hearing of an Intended Appeal from the Ruling of the High Court of Kenya

at Kitale (Obaga, J) Dated 22nd October, 2014

in

H.C.C.S. NO. 31 OF 2014)

RULING OF THE COURT

1. In an ex-tempore ruling we delivered on 20th November, 2014, we dismissed **Charles Asikowa Okolo's** Notice of Motion dated 24th October, 2014 and undertook to give our reasons therefor today. The following are therefore our reasons for dismissing that application.
2. For clarity and to put the matter in context we need to give a summary of the background facts in this matter
3. On 25th October, 2005, the applicant entered into an agreement with one **Benjamin Nyamumbo Oonge** (the vendor) for the purchase of 31 acres of the vendor's piece of land situate in Kitale and known as L.R No.8994/20 (the suit land) for Kes.6,080,000. It would appear that that transaction fell through and in 2011, the applicant filed **Kitale HCCC No. 39 of 2011** against Benjamin Nyamumbo Oonge as the 1st defendant, Agricultural Finance Cooperation as the 2nd defendant and Emkos Company Limited as the 3rd defendant, and sought *inter alia* an order of specific performance or in the alternative the refund of the purchase price paid to the vendor. The applicant's claim for specific

performance was dismissed but the alternative claim was granted.

4. Despite that judgment, the applicant who had already taken possession of the suit land refused to vacate it. Emkos Company Limited, which was apparently the beneficial owner of the suit land, filed a suit in which it sought the applicant's eviction. Contemporaneous with the filing of that suit, Emkos filed an application in which it obtained an ex-parte order of injunction on 29th January, 2014, restraining the applicant from, in any way, interfering with Emkos use of the suit land. That order was confirmed on 31st March, 2014 after inter-partes hearing.

5. Despite those clear orders which were duly served upon him, the applicant ploughed the suit land and planted maize on it. On 7th October, 2014, in an application grounded on Sections 3, 3A and 63(e) of the Civil Procedure Act, the applicant sought leave of the court to enter the suit land and harvest the maize crop thereon. Obaga, J. dismissed that application on 22nd October, 2014 thus provoking the present application.

6. In the application the applicant seeks more or less the same orders as the ones he had sought in the High Court save that he now seeks in addition an order staying the execution of Obaga J's said dismissal order of 22nd October, 2014 pending the filing, hearing and final determination of an intended appeal.

7. Basing his submissions on the averments in the applicant's affidavit sworn on 24th October, 2014 in support of this application, Mr. Mungao, learned counsel for the applicant, argued that after delivery of the High Court judgment in Kitale HCCC No. 39 of 2011 on 29th August, 2013, the applicant was not restrained from remaining or using the suit land. He was restrained from doing anything on the land by the orders of 31st March, 2014 and 22nd October, 2014 after he had ploughed and planted maize on it. The applicant should therefore be allowed to harvest the maize crop as the respondent has no equitable right to it

8. The application was strongly opposed. Mr. Kiarie, learned counsel for the respondent, submitted that to allow the applicant to harvest the maize crop that he planted in defiance of clear court orders, will amount to assisting him to disobey court orders. He therefore urged us to dismiss this application with costs.

9. We have read the file and considered these rival submissions. It is not in dispute that the applicant knew of the court orders of 29th January, 2014 and 31st March, 2014 because the rulings giving rise to those orders were not only delivered in the presence of his counsel but court orders were extracted from the rulings and duly served upon the applicant. Despite that, in contumacious disobedience of those orders, the applicant ploughed and planted maize on the suit land. Having been restrained by three orders, he now comes to us and seeks an order to permit him to enter the suit land and harvest his maize crop. It is not only an affront to the rule of law and an abuse of the court process but also against public policy for any court to, as it were, assist a party to continue disobeying clear court orders. Consequently we dismiss this application with costs to the respondent.

DATED and Delivered at Kisumu this 12th day of February 2015

D.K.MARAGA

.....

JUDGE OF APPEAL

F.AZANGALALA

.....

JUDGE OF APPEAL

S.ole KANTAI

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR