



REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

MISC. CIVIL APPLICATION NO. 38 OF 2012

PATRICK WEKESA MULONGO.....APPLICANT

VERSUS

CRISPINUS WABOMBA MULONGO.....1ST RESPONDENT

WILLMINA NALONJA CHEMBUKHA.....2ND RESPONDENT

WANAMBISI STEPHEN JUMA.....3RD RESPONDENT

CHRISTIM S. KUREMU.....4TH RESPONDENT

RULING

The Notice of Motion application dated 23rd May, 2012 brought under Section 5 of the Judicature Act and Section 121 of the Penal Code seeks;-

1. That the respondents namely Crispinus Wekesa Mulongo, Wilmina Nalonja Chembukha, wanambisi Stephen Juma and Christim S. Kuremu be cited and punished for contempt.
2. That costs of this application be provided for.

The grounds in support are that the respondents were duly served with a valid Court Order made on 9/7/2009, that despite service, the respondents have deliberately ignored, refused and or failed to obey the order terming it a useless order, that orders must be obeyed for the proper administration of justice as its disobedience belittles the court and brings its authority into question and finally that it is in the interest of justice to grant the orders.

The application is further supported by the applicant's affidavit dated 23rd May, 2012 and a further affidavit dated 25th February, 2013.

The 1st respondent opposes the application. He filed his replying affidavit on 5th December, 2012 disputing service of the order on him, that the application is defective and sought to cross examine the process server on the veracity of his disposition.

The 3rd and 4th respondents filed their responses on 10th September, 2020 where they denied service of the orders upon themselves. The 3rd respondent depones that he has never been involved in any dispute with the applicant but is aware that there have been proceedings between the applicant and the 1st respondent.

Directions were given on 12/10/2020 for parties to file written submissions but only the applicant filed his on 15th January, 2020. The court shall therefore proceed on the basis of the respondent's replying affidavits.

This matter has its roots in Bungoma High Court P & A Cause No. 106 of 2003 which culminated in the issuance of the orders of 9th July, 2009 which directed the holders of Titles Deeds listed therein to surrender them to the District Land Registrar Bungoma within 7 days from date of service for cancellation.

The applicant states that despite service, the respondents have deliberately ignored, refused and or failed to obey the order terming it a useless order. On the respondents' part, the common thread running through their replies is that they were not served with the order save the 2nd respondent (Jephunea Wasike Werunga) who is said to be deceased as at the time the orders were issued.

The sole issue arising for determination is whether the respondents are in contempt of court and, if so, what orders should be granted.

Contempt of court refers to Conduct that defies the authority or dignity of a court. In Kenya, contempt of court proceedings are governed by the provisions of Section 5 of the Judicature Act which provides: -

1. The High Court and the Court of Appeal shall have the same power to punish for contempt of court as is for the time being possessed by the High Court of Justice in England, and that power shall extend to upholding the authority and dignity of subordinate courts.

In *Samuel M.N Mweru & Ors Vs National Land Commission & 2 Others (2020)eKLR, Mativo J.* observed;-

A court without contempt power is not a court. The contempt power (both in its civil and criminal form) is so innate in the concept of jurisdictional authority that a court that could not secure compliance with its own judgments and orders is a contradiction in terms, an “oxymoron.” Contempt power is something regarded as intrinsic to the notion of court; even obvious, I would say. In the common lawyer’s eye, the power of contempt “is inherent in courts, and automatically exists by its very nature.

In order to succeed in contempt proceedings, the applicant has to prove **(i)** the terms of the order, **(ii)** Knowledge of these terms by the Respondent, **(iii)**. Failure by the Respondent to comply with the terms of the order. The presence of willfulness and bad faith on the part of the Respondent is normally to be inferred from the conduct.

On the requirement of the proof of the terms of the order, it is not in doubt that this court issued orders on 9th July, 2009 directing the respondents to surrender the Title deeds for cancellation. The Order annexed to the application indicates that the dispute was between Patrick Wekesa Mulongo as the petitioner (the applicant herein) and Crispinus Wabomba Mulongo as the objector (the 1st respondent herein). The 2nd -4th respondents were non-parties.

The affidavit of service sworn by Harrison J.M Nzuya on 19th August, 2009, depones that he personally served Crispinus Wabomba Mulongo (the 1st respondent), Wilmina Nalonja Chembukha (the 2nd respondent) and Wanambisi Stephen Juma (the 3rd respondent) on the 4th August, 2009.

He further depones that on 5th August, 2009, he served Christim S. Kuremu at Mabanga Village. As regards one, Jephunea Wasike Werunga, it is stated that he had died by the time of service.

From the evidence on record, this court notes that thereafter, the 1st respondent filed an application dated 24th August, 2009 seeking a review of the orders issued on 9th July, 2009 which application was dismissed. It is therefore not true that he was not served with the order. Had he not known of the existence of the order, he could not have preferred the application of 24th August, 2009.

As regards the 2nd and 3rd respondents, a mere denial of service is not enough. As it stands, the orders are still in force and ought to be complied with otherwise it will not serve its intended purpose notwithstanding the fact that the respondents were non-parties in the suit that bore the orders.

On the knowledge of the terms of the order by the respondents, the order was exquisitely clear that the respondents were required to surrender the original Title Deeds for the parcels of land listed therein.

The respondents did not take steps but only filed replying affidavits disputing service and nothing more. The fact that they were served is sufficient to support a finding of contempt of court. Without setting aside the orders, this court is duty bound to ensure that its orders are implemented to forestall a situation where orders are issued in vain. Anarchy will ensue when parties deliberately ignore court orders much to the detriment of the applicant whose rights will not be enforceable.

The court of appeal; (**Karanja, Mwera & Mwilu, JJ.A**) in restating the importance of obedience of court orders in *Shimmers Plaza Limited Vs National Bank of Kenya Limited (2015) eKLR* held;-

The courts should not fold their hands in helplessness and watch as their orders are disobeyed with impunity left, right and centre. This would amount to abdication of our sacrosanct duty bestowed on us by the Constitution. The dignity, and authority of the Court must be protected, and that is why those who flagrantly disobey them must be punished, lest they lead us all to a state of anarchy .We think we have said enough to send this important message across.

The other ingredient that must be proved in a contempt of court application is failure to comply with the terms of the order.

As earlier stated, the order required the respondents to surrender the Title Deeds in their possession. The respondents have not disputed being in possession of the Title Deeds. The mere response they gave is non-service which this court has found not to be true.

The respondents have also not set in motion a process of having the orders lifted or set aside if indeed they have a different version of the facts obtaining. The 1st respondent did make an attempt through an application dated 24th August, 2009 which was subsequently dismissed.

This court therefore finds that the respondents have willfully and deliberately neglected to obey the orders of the court given on 9th July, 2009 and therefore the application dated 23rd May, 2012 is allowed.

I therefore direct that the respondents;

1. CRISPINUS WABOMBA MULONGO
2. WILMINA NALONJA CHEMBUKHA
3. WANAMBISI STEPHEN JUMA
4. CHRISTIM S. KUREMU

To appear before this court on **14th July, 2021** at **12.30 p.m** for mitigation and sentence. It is so ordered.

DATED AT BUNGOMA THIS 24TH DAY OF JUNE, 2021

S. N RIECHI

JUDGE