



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

HCCC NO. 293 OF 2013

RAFIQUE EBRAHIM PLAINTIFF

VERSUS

WILLIAM OCHANDA ONGURU T/A

OCHANDA ONGURU & CO. ADVOCATES.....DEFENDANT

RULING

BACKGROUND

1. The plaintiff/applicant herein sued the defendant/respondent through an amended plaint dated 1st August 2013 seeking the following orders:-

- a) To have a full and true account of all the moneys as received and utilized by the defendants.*
- b) A refund of all the remaining funds to the plaintiff by the defendants.*
- c) Title deeds held by the defendants on behalf of the plaintiff, if any*
- d) Costs of this suit.*
- e) Interest on b) and c) above.*

2. The plaintiff obtained the orders sought in the plaint and on 23rd January 2018. Amin J. issued the following directions.

“The court further orders that the defendants shall comply with the Order of Hon. J. Havelock within 30 days. In addition the defendants ordered to lodge with the Deputy Registrar of the Commercial and Tax Division all original title deeds and sale agreements they hold pending further order of the court, also within 30 days. Penal Notice attached.”

Application

3. Through the application dated 29th March 2019 the plaintiff seeks to cite the defendant herein for contempt. The plaintiff's case is that the defendant has deliberately failed and ignored to comply with the orders of 23rd January 2018 despite notice of the said orders and despite being present in court at the time the delivery of the said orders.

4. At the hearing of the application, **Miss Khaminwa**, learned counsel for the applicant submitted that the defendant had not purged the contempt even after the filing of the instant application despite the fact that he is an advocate of the High Court of Kenya.

5. The respondent opposed the application through his replying and further affidavit sworn on 7th and 27th June 2019 respectively wherein he denies being in contempt of court and contends that he was not served with the impugned court order either personally or through his advocate on record.

6. He states that despite lack of personal service, he on 4th June 2019 lodge title documents in his possession in court as shown in a letter

marked annexure “WOO1”. He avers that he released, titles Nos. Nairobi Block 90/584,585 and 586 to the plaintiff on 21st September 2011 as shown in annexure “WOO2”.

7. With respect to title documents for LR No. 23218 KAREN, he states that the same is still with the advocate for the sellers **M/S Onsando Ogonji & Tiego Advocates**. He attached a copy of the said advocate’s letter dated 4th April 2013 to his replying affidavit as annexure “WOO3” confirm this averment.

8. On title for LR No. 209/10819, he states that the same was lodged for transfer on June 2011 as shown in the true copy of the daybook number 1348 marked as annexure “WOO4”. He adds that the said registration was however not effected even after numerous correspondence of complaints as shown in annexures “WOO5-10” that culminated in the need for an audit query that required the applicant’s attendance to the registrar’s call.

9. The respondent contends that in view of the above explanation, he does not have any title to lodge in court and that he had moved the court in an application seeking to enjoin the advocates for the sellers to the suit which application was dismissed by the court. He further states that he complied with the order to submit accounts which he forwarded to the applicants counsel as shown in annexure marked “WOO11.” He confirms that all the original sale agreements were delivered to the applicant and that he retained only the copies.

10. He contends that he submitted all the title documents to the Deputy Registrar on 4th June 2019 but that through a letter dated 11th June 2019 (annexure “WOO1”) the said titles were returned to him on the basis that they were not accompanied by the sale agreements as ordered by the court. He therefore seeks the directions of the court in respect to the said returned titles.

11. At the hearing of the application, **Mr. Otieno**, learned counsel for the respondent reiterated that the respondent made all efforts, upon being made aware of the orders of Amin J., to comply with the said orders as shown in the various annexures attached to both the replying and further affidavits. Counsel submitted that the defendant is ready able and willing to re-submit the titles documents that were returned to him by the Deputy Registrar as soon as the plaintiff avails the titles in his custody.

Analysis and determination

12. I have carefully considered the application dated 29th March 2019, respondent’s response and the parties’ respective submissions. The main issue for determination is whether the defendant is in contempt of the courts orders of 23rd January 2018.

13. Section 1A, 1B and 3A of the Civil Procedure Act and Section 5 of the Judicature Act empowers this court to punish parties for contempt of court in order to safeguard the Rule of Law and the administration of justice. Section 5 of the Judicature Act stipulates as follows:

“(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.”

14. Section 36(1) of the High Court (Organization and Administration) Act on the other hand stipulates as follows:-

“(1) A person who-

(b) Willfully and without lawful excuse disobeys and order or directions of the court in the court of the hearing of as proceeding.

(d) Having been called upon to give evidence in a judicial proceeding, fails to attend, or having attended refuses to be sworn or to make an affirmation, or having been sworn or affirmed, refuses without lawful excuse to answer a question or to produce a document, or remains in the room in which such proceedings in being heard or taken after the witnesses have been ordered to leave such room;

(e) Causes an obstruction or disturbance in the court of a judicial proceeding,

(j) Commits any other act of intentional disrespect to any judicial proceedings, or to any person before whom such proceeding is heard or taken, commits an offence.

(3) A person who commits an offence under subsection (1) shall, on conviction be liable to imprisonment for a term not exceeding five days, or to a fine not exceeding one hundred thousand shillings, or both.

(4) In exercise of its powers under this section, the court shall observe the principles of fair administration of justice set out in Article 47 of the Constitution.

15. In **Hadkinson V Hadkinson [1952]ALL E.R. 567**, it was held:

“It was the plain and unqualified obligation of every person against, or in respect of, whom an order was made by a court of competent jurisdiction to obey it unless and until it was discharged, and disobedience of such an order would, as a general rule, result in the person disobeying it being in contempt and punishable by committal or attachment and in an application to the court by him not being entertained until he had purged his contempt.”

16. Blacks Law Dictionary defines contempt as follows:

“Contempt is a disregard of, disobedience to, the rules, or orders of a legislative or judicial body, or an interruption of, its proceedings by disorderly behavior or insolent language, in its presence or so near thereto as to disturb the proceedings or to impair the respect due to such a body.”

17. In the present case, the respondent argues that he cannot be held liable for contempt as he was not personally served with the orders in question and neither was his advocate on record made aware of the said orders. My finding on the issue of personal service is that the same was not necessary in view of the fact that the respondent was on 23rd January 2018 when the ruling was read represented by his advocate M/S Musyoki.

18. My findings on the issue of service of the court order notwithstanding, the question which begs an answer in this application is whether the defendant has disobeyed the court order in question. The respondent explained, in great detail, the steps he took, upon becoming aware of the impugned court order and upon being served with this application to comply with the said order. The said steps taken by the respondent culminated in the lodging of the title documents with the Deputy Registrar on 4th June 2019. It however turns out that on 11th June 2019, Deputy Registrar returned the said title documents to the respondent on the basis that they were not accompanied with the original copies of the sale agreements. The respondent’s case was that the original sale agreements are in the custody of the plaintiff a claim which the plaintiff did not deny.

19. My finding is that given the elaborate explanation tendered by the respondent in both the replying and further affidavit, regarding the steps he took towards complying with the court, which explanation was not disputed/countered by the plaintiff, the defendant cannot be said to be in contempt of the court order in question. My take is that instead of returning the title documents to the defendant, the Deputy Registrar should have simply called upon the parties to submit the original sale agreements to her.

20. For the above reasons, I decline to find that the defendant is in contempt and I direct the defendant to resubmit the title documents in court in line with the orders of 23rd January 2018. The plaintiff will in turn submit the original sale agreements. In the event that the original sale agreements are not available, the parties may submit certified copies of the original sale agreements.

It is so ordered.

Dated, signed and delivered in open court at Nairobi this 30th day of January 2020.

W. A. OKWANY

JUDGE

In the presence of:

Mr. Otieno for Mungao for defendant

No appearance for the plaintiff.

Court Assistant – Sylvia